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PREFATORY NOTE

Agriculture Decisions is an official publication designed to facilitate access to decisions and orders issued by the Secretary of Agriculture, or officers authorized to act in his stead, in matters arising under laws administered by the Department of Agriculture.

The published decisions principally consist of those issued in formal adjudicatory administrative proceedings conducted for the Department under various statutes and regulations pursuant to the Administrative Procedure Act. Selected court decisions concerning the Department's regulatory programs are also included. The Department is required to publish its rules and regulations in the Federal Register and, therefore, they are not included in Agriculture Decisions.

Consent Decisions entered subsequent to December 31, 1986 are no longer published. However, a list of these decisions is included. (53 F.R. 6999, March 4, 1988.) The decisions are on file and may be inspected upon request made to the Hearing Clerk, Office of Administrative Law Judges.

Decisions are published in order of their issuance or finality under the principal statutes administered by the Department, which are the Agricultural Marketing Act of 1946 (7 U.S.C. § 1621 *et seq.*.), the Agricultural Marketing Agreement Act of 1937 (U.S.C. § 601 *et seq.*), Animal Quarantine and Related Laws (21 U.S.C. § 111 *et seq.*), the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*), the Federal Meat Inspection Act (21 U.S.C. § 601 *et seq.*), the Grain Standards Act (7 U.S.C. § 1821 *et seq.*), the Horse Protection Act (15 U.S.C. § 1821 *et seq.*), the Packers and Stockyards Act, 1921, (7 U.S.C. § 181 *et seq.*), the Perishable Agricultural Commodities Act, 1930, (7 U.S.C. § 499a *et seq.*), the Plant Quarantine Act (7 U.S.C. § 151 *et seq.*), the Poultry Products Inspection Act (21 U.S.C. § 451 *et seq.*), and the Virus-Serum-Toxin Act of 1913 (21 U.S.C. §151 *et seq.*).

The published decisions may be cited by giving the volume number, page number and year, e.g., 1 Agric. Dec. 472 (1942). It is unnecessary to cite a decision's docket or decision number. Prior to 1942 decisions were identified by docket and decision numbers, e.g., D-578; S. 1150 and the use of such references generally indicates that the decision has not been published in Agriculture Decisions.

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PLANT QUARANTINE ACT

In re: CUMBERLAND FARMS FOOD STORES, INC., and CUMBERLAND FARMS, INC.
AMA Docket No. MM-4.
Decision and Order filed May 10, 1988.

The Judicial Officer affirmed Judge Campbell's Decision and Order denying the relief requested by petitioners. Petitioners are "handlers" of milk subject at times to Order No. 13 (7 C.F.R. Part 1013) or Order No. 6 (7 C.F.R. Part 1006), which regulate the handling of milk in Florida marketing areas. Petitioners instituted this action to challenge amendments to the Orders which partially eliminated the benefit petitioners had received under the Orders from a large, negative location adjustment. The amendments left the large, negative location adjustment in effect only for that portion of petitioners' milk that petitioners actually transported from Delaware to Florida. Previously, petitioners received the identical location adjustment on that portion of petitioners' milk transferred from Delaware to New Jersey. The Secretary may, under § 8c(5)(A) and § 8c(7)(D), limit a negative location adjustment to that portion of the milk which is actually transported in a manner to earn the location adjustment. The Secretary's decision is supported by *In re Borden, Inc.*, 46 Agric. Dec. ____ (Sept. 30, 1987), *appeal docketed*, No. 87-2820 (D.D.C. Oct. 20, 1987).

Gregory Cooper, for respondent.
Marvin Beshore, Harrisburg, Pennsylvania, for petitioners.
Initial decision issued by John A. Campbell, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a proceeding under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 608c(15)(a)). Petitioners are "handlers" of milk subject at times to Order No. 13 (7 C.F.R. Part 1013) or Order No. 6 (7 C.F.R. Part 1006), which regulate the handling of milk in Florida marketing areas. Petitioners instituted this action to challenge amendments to the Orders which eliminated the benefit petitioners had received under the Orders from a large, negative location adjustment, i.e., the amendments left the large, negative location adjustment in effect only for that portion of petitioners' milk that petitioners actually transported from Delaware to Florida.

Section 8c(5)(A) of the Act authorizes the Secretary of Agriculture to classify milk in accordance with the form in which it is used by a milk handler (e.g., Class I milk is milk sold as fluid milk; Class II milk is milk sold as "soft" products, such as cottage cheese; and Class III milk is milk sold as "hard" products, such as butter), and to fix "minimum prices for each such use classification which all handlers shall pay . . . for milk purchased from producers" (7 U.S.C. § 608c(5)(A)). "Such prices shall be uniform as to all handlers, subject only to adjustments for . . . (3) the locations at which delivery of such milk . . . is made to such handlers" (*id.*).*

That adjustment, called a "location adjustment," can be a negative adjustment to the Class price required to be paid by a handler, thereby reducing the handler's cost. A negative location adjustment recognizes the

See generally Vetne, *Federal Marketing Order Programs*, in 1 Davidson, Agricultural Law, § 2.35 (1981 and 1987 Cum. Supp.); Brooks, *The Pricing of Milk Under Federal Marketing Orders*, 26 Geo. Wash. L. Rev. 181 (1958).

lower value of milk delivered, e.g., to a handler's supply plant located a considerable distance from the consumption center, where the handler must incur extra hauling costs in delivering milk to the consumption center. That is the situation involved here as to milk that is delivered by producers to petitioners' Dover, Delaware, supply plant, and then hauled by petitioners to their Riviera Beach, Florida, distributing plant.

Conversely, a location adjustment can be a positive adjustment to the Class price required to be paid by a handler, thereby increasing the handler's cost, in order to compensate producers for hauling costs incurred in delivering bulk milk to a handler's distribution plant located a considerable distance from the production area. That is, producers delivering milk to such a distant handler receive extra compensation because they have provided an economic service of benefit to the distant handler.

On October 9, 1986, Chief Administrative Law Judge John A. Campbell (ALJ) filed an initial Decision and Order in which he held that the amendments are lawful, and he denied the relief requested by petitioners.

On November 19, 1986, petitioners appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).**

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 900.65(b)), was requested by petitioners, but is denied inasmuch as the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, with a few trivial changes, some of which are included within brackets. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*, hereinafter referred to as the "Act"), instituted by petitioners, a regulated handler, subject at times to Federal Milk Orders No. 13 or 6 (7 CFR 1013, 1006). The petition was filed herein on October 22, 1985.

In 1981 Petitioners' plant at Dover, Delaware, became a pool supply plant under Order No. 13 by virtue of: (1) its shipments of milk (for Class I uses) to its plant at Riviera Beach, Florida, and (2) the Riviera Beach plant's sales in the Order No. 13 area. To attract milk to the Florida area, Order No. 13 provided a location adjustment or allowance (1.5¢ per hundredweight for each 10 miles) that the milk traveled to Florida. In the case of the movement between the Dover plant and the Riviera Beach plant, the location adjustment

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**The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

or credit amounted to $1.59 per hundredweight of milk. This allowance was applicable on all Class I milk moved out of the Dover plant.

In 1983 and 1984 there were amendments to Orders 13, 6 and 12 which reduced the location allowance (to 49 cents under Order 13) on milk which did not move to Florida, but moved instead to petitioners' plant at Florence, New Jersey, a regulated plant under Order No. 4 (7 CFR 1004). The allowance was not changed with respect to milk which continued to move south to the Florida Orders. On the non-Florida milk the Florida allowance was reduced and instead the Dover Class I milk was priced in accordance with other Federal Order pricing provisions to which that milk moved.

It is the diminution of the location allowance on the non-Florida milk ($1.10 under Order No. 13 and $.96 under Order No. 6) which petitioners challenge here, characterizing such reduction a "surcharge."

It is petitioners' contention that this case presents for decision the challenge to a unique price surcharge imposed upon it by the terms of Federal Milk Market Orders 6 and 13. Petitioners claim that the challenged provisions established a multiple Class I price for milk received by petitioners at a supply plant facility in Dover, Delaware. The resulting surcharges are challenged on the grounds (1) that the surcharge is not authorized by the Act, and (2) that the surcharge is unsupported by the hearing record and is an abuse of the Secretary's discretion.

Respondent, Administrator, Agricultural Marketing Service, filed an answer on November 19, 1985, upholding the validity of the contested amendments to the Orders.

An oral hearing was held on March 19, 1986, in West Palm Beach, Florida.[1] Petitioners were represented by Marvin Beshore, Esq., Harrisburg, Pennsylvania. Respondent was represented by Donald A. Tracy, Esq., Office of the General Counsel, United States Department of Agriculture, Washington, DC. At the close of the hearing the time was fixed for the filing of briefs. The last brief was filed on September 23, 1986.

Pertinent Statutory Authority

7 USCA § 608c. Orders regulating handling of commodity

Issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or

[1]The designation "Tr." refers to page numbers in the March 19, 1986, hearing transcript.

affects, interstate or foreign commerce in such commodity or product thereof.

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Milk and its products; terms and conditions of orders

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. *Such prices shall be uniform as to all handlers, subject only to adjustments for* (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) *the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.* (Emphasis added)

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Terms common to all orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) ----------

(B) ----------

(C) ----------

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) to (7) of this section and necessary to effectuate the other provisions of such order.

Pertinent Order Provisions

Milk In Southeastern Florida Marketing Area - 7 CFR Part 1013

§ 1013.50 Class prices.

Subject to the provisions of § 1013.52, the class prices for the month per hundredweight of milk shall be as follows:

(a) Class I price. The Class I price shall be the basic formula price for the second preceding month plus $3.15, and plus $0.20 for the months of September 1984 through February 1985.

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§ 1013.52 Plant location adjustments for handlers.

(a) The Class I price for producer milk and other source milk at a plant located outside the State of Florida or within the State of Florida but outside of the defined marketing area shall be adjusted at the rates set forth in the following schedule: *Provided, That the resulting adjusted price for fluid milk products transferred from a pool plant to a plant regulated under another Federal order shall not be less than the Class I price under such other federal order that is applicable at the location of the transferor plant:*[2]

Location of plant	Rate per cwt
Outside the State of Florida:	
For each 10 miles or fraction thereof from the U.S. Post Office in West Palm Beach, Fla.	Subtract 1.5 cents

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Milk In Upper Florida Marketing Area - 7 CFR Part 1006

§ 1006.50 Class prices.

Subject to the provisions of § 1006.52, the class prices per hundredweight for the month shall be as follows:

(a) Class I price. The Class I price shall be the basic formula price for the second preceding month plus $2.85, and plus $0.20 for the months of September 1984 through February 1985.

§ 1006.52 Plant location adjustments for handlers.

(a) The Class I price for producer milk and other source milk at a plant located outside the State of Florida and more than 70 miles from the nearer of the City Halls of Jacksonville or Tallahassee, Florida, or within the State of Florida shall be adjusted at the rates set forth in the following schedule: *Provided, That the resulting adjusted price for fluid milk products transferred from a pool plant to a plant regulated under another Federal order shall not be less than the Class I price under such other Federal order applicable at the location of the transferor plant:*[3]

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[2]Underscoring added to indicate provisions amending order, effective August 1, 1983 (48 F.R. 29672).

[3]Underscoring added to indicate provision amending order effective November 1, 1984. (49 F.R. 37567). The Tampa Bay Order (7 CFR Part 1012) was amended in the same manner, effective November 1, 1984.

Location of plant	Rate per cwt
Outside the State of Florida:	
In excess of 70 but not more than 85 miles.	Subtract 10 cents
For each additional 10 miles or fraction thereof.	Subtract 1.5 cents

Findings of Fact

1. Petitioners are Cumberland Farms Food Stores, Inc., and Cumberland Farms, Inc. Cumberland Farms, Inc., is a corporation which on or about October 1, 1984, succeeded to all the business and accounts of Cumberland Farms Food Stores, Inc. (Petitioners will be referred to hereafter as "Cumberland" or "Petitioner").

2. Cumberland operates milk handling and processing plants at several locations in the eastern United States, including a fluid milk processing plant at Riviera Beach, Florida; a fluid milk processing plant at Florence, New Jersey; and a supply plant at Dover, Delaware.

3. Cumberland's plants at Riviera Beach, Florida, and Florence, New Jersey, are "distributing plants" regulated under the terms of federal milk marketing orders. The Florence plant has at all pertinent times been regulated under the terms of the Middle Atlantic Marketing Order, Order 4, 7 C.F.R. 1004. The Riviera Beach, Florida, plant has been regulated under the terms of either the Southeastern Florida Order, Order 13, 7 C.F.R. 1013, or the Upper Florida Order, Order 6, 7 C.F.R. 1006. The Dover, Delaware, "supply plant" has been regulated under the terms of either Order 6 or Order 13 at all relevant times.

4. Cumberland began operating the Dover, Delaware, plant October 1, 1981. The Dover facility, as a "supply plant" under 7 C.F.R. 1013.6 and 1006.6, is a plant where raw milk is received from farms, stored, assembled and reloaded to over-the-road tank trucks for delivery in bulk to processing plants.

5. Petitioner's witnesses testified at the rulemaking and instant proceedings that in 1981, the local cooperatives in Florida were charging Cumberland and other Florida handlers nearly $2.00 per hundredweight over the minimum federal order price for Class I milk.

6. Cumberland opened the Dover, Delaware, plant for the purpose of supplying the fluid milk requirements of the Riviera Beach, Florida, distributing plant, on a more economical basis than purchasing the local premium-priced supplies.

7. Cumberland entered into a supply arrangement with cooperatives and producers in the Dover, Delaware, vicinity to provide sufficient volumes of milk through Dover to meet the needs of the Riviera Beach plant.

8. In order to meet the requirements of any Class I plant on a year round basis, it is necessary to assemble a reserve supply of milk to take into account seasonal and weekly fluctuations in demand; seasonal milk production fluctuations at the farm level; and the stringent quality requirements inherent in delivering raw milk more than 1,000 miles from farm to plant.

9. The Class I demands of the fluid market in Florida vary greatly on a seasonal basis because of the seasonal population fluctuations associated with

the tourist industry in Florida. These demand fluctuations are greater than in other regions.

10. Because of the necessary reserve supply, from the very beginning a portion of the producer milk received at Dover was not required, or available, for delivery to Riviera Beach. These surplus supplies were transferred from Dover, Delaware, to Cumberland's Florence, New Jersey, distributing plant.

11. Cumberland as the operator of the Dover, Delaware, plant incurs various expenses related to those operations to which its witnesses testified in the promulgation hearings. Those expenses include: Plant overhead, shrinkage, transportation expenses, administrative expenses and additional Class II costs.

12. Under federal orders, all of a plant's receipts are regulated under one order if the plant qualifies as a "pool plant."

13. A supply plant under the Florida Orders is a pool plant if it delivers at least 50% of its receipts to a pool distributing plant. 7 C.F.R. §§ 1013.7(b); § 1006.7(b).

14. Cumberland's Dover plant at all times had to ship in excess of 50% of its receipts to Riviera Beach to be pooled under the Florida Orders.

15. Prior to the amendments which are the subject of this action, the price for milk received at Dover, Delaware, was established as it is under all other federal orders by adjusting the Class I price at a stipulated rate (1.5 cents per hundredweight per ten miles) from a market center point to the location of the distant receiving plant.

16. Location adjustments take into account the reduced value of milk delivered to a handler at a location distant from the population center of the market and allow for transportation costs necessarily incurred in moving the bulk raw milk from the supply plant to the distributing/processing plant.

17. Prior to the amendments, the Class I prices [specifically, the Class I price differentials] in Orders 6 and 13 were:

	Order 13	Order 6
Florida Order Class I Prices	$3.15	$2.85
Location Allowance Dover To Florida Class I Milk Shipment	(-$1.59)[4]	(-$1.15)
Effective Class I Price At Dover on all Class I milk	$1.56[4]	$1.70

18. After the amendments, the Class I prices [specifically, the Class I price differentials] in Orders 6 and 13 were:

[4](-$1.62) and $1.53 prior to October 1983. See: Tr. pp. 73-74, and Petitioner's Exhibit 1.

	Order 13	Order 6
Florida Order Class I Prices	$3.15	$2.85
Same Effective Class I Price At Dover on Class I Milk Shipped To Florida Orders With Same Location Adjustment As in Finding 17	$1.56	$1.70
	(-1.59)	(-1.15)
Location Allowance Dover To Florence, Class I Milk Shipments	(-$.49)[5]	(-$.19)
Effective Class I Price At Dover on Class I Milk Shipped To Florence Plant Order No. 4	$2.66	$2.66

19. The effect of the amendment was a decrease in the location allowance of $1.10 ($1.59-$.49) per hundredweight on all shipments from Dover to Florence, classified as Class I under Order 13; and a $.96 per hundredweight decrease ($1.15-$.19) under Order 6 for all shipments from Dover to Florence classified as Class I under Order 6.

20. A public hearing was held on August 24, 1982, in Philadelphia, Pennsylvania, to consider proposals to amend Order No. 4 (Middle Atlantic Marketing Area) and Order No. 13 (Southeastern Florida Marketing Area). Notice of the hearing was published in the Federal Register on August 10, 1982 (47 FR 34573). An amendment to the location adjustment provision under Order No. 13 was proposed by the Southland Corporation, which is the subject of this proceeding. Various witnesses testified in favor of and in opposition to the Southland proposal to limit the location adjustment on milk transferred to another federal order. At the close of the hearing, interested parties were given an opportunity to file briefs.

This was followed by the issuance of a recommended decision by the Deputy Administrator, Marketing Program Operations (48 F.R. 10848), and afforded interested parties an opportunity to file exceptions thereto.

On May 18, 1983, the final decision of the Assistant Secretary, Marketing and Inspection Services, was published in the Federal Register (48 FR 22303). The final decision adopted and approved the findings and conclusions of the recommended decision, and added further rulings and commentary with respect to exceptions that had been filed.

The final decision adopted an amendment to Order No. 13, to ensure that the Order No. 13 Class I price for milk, transferred for fluid use from a pool plant located outside Florida to a plant regulated under another Federal

[5]Tr. p. 79.

Order, would not be lower than the other Order's Class I price at the location of the pool plant.

The final decision reads in part:

> The plant location adjustment provision should be changed to ensure that fluid milk transferred to an other order plant for Class I use from a Southeastern Florida pool plant located outside Florida would be subject to a Class I price no lower than that which would be applicable at the transfer or plant if it were regulated under the other Federal order. The effect of this change would be to limit the amount of the location adjustment credit to Southeastern Florida handlers so that the Class I price for milk moved to other order plants would be comparable to the Class I price applicable to handlers competing with the transferee plants.
>
> For plants located outside the State of Florida, the location adjustment provisions of the Southeastern Florida order presently provide that the Class I price be adjusted downward by 1.5 cents per hundredweight for each 10 miles a plant is located from West Palm Beach, Florida. The basic purpose of this provision is to provide a transportation allowance to handlers who assemble milk at plant locations outside the marketing area and move it to plants within the marketing area for use in Class I so that handlers' cost of milk so moved is more competitive with that for milk obtained locally.
>
> Cumberland Farms, which operates distributing plants regulated under both the Southeastern Florida and the Middle Atlantic Federal orders, since October 1981 has obtained most of its milk supply for its Southeastern Florida pool distributing plant at Riviera Beach from its supply plant located at Dover, Delaware. The Dover plant, which is located within the Middle Atlantic, or Order 4, marketing area, delivers a large enough proportion of its receipts to the Riviera Beach plant to be an Order 13 pool plant. The remainder of the Dover plant's receipts are sent to the handler's fluid milk plant at Florence, New Jersey, an Order 4 pool plant, where the milk is allocated to Class I and Class II use according to the terms of the Middle Atlantic order. The hearing record indicates that over 75 percent of the milk transferred from Dover to Florence is classified in Class I use, on which there is a location adjustment credit under the Florida order.
>
> The proponent of the pricing change adopted in this decision is the Southland Corporation, a handler operating fluid milk plants in both the Middle Atlantic and Southeastern Florida markets. Southland's concern is the erosion of uniform pricing of Class I milk used by handlers regulated under Order 4. According to proponent's witness, the principal basis of the problem is the severe misalignment of Class I prices at the Dover, Delaware, plant location between the Southeastern Florida and Middle Atlantic milk orders.
>
> Class I price differentials under Federal milk orders generally increase 1.5 cents for each 10 miles of distance from Eau Claire, Wisconsin. Because the Northeast markets and the Florida markets

are a substantial distance from Eau Claire, prices in those respective areas are approximately the same. The Class I differential at Philadelphia under the Middle Atlantic order is $2.78, to which is added a 6-cent direct delivery differential for a total differential cost of $2.84. Under the Southeastern Florida milk order, the Class I price differential is $3.15. However, when Class I price differentials in Federal order markets that are in different directions from Eau Claire are again adjusted 1.5 cents per 10 miles toward locations other than Eau Claire, substantial differences in Class I prices at a given plant location can result. When the Southeastern Florida order differential is adjusted to Dover, a location approximately 1,080 miles from West Palm Beach, the Order 13 Class I price differential there becomes $1.53. At Dover the Class I price differential under Order 4 is $2.66. Milk at Dover, therefore, is available to the Middle Atlantic pool plant at Florence for Class I use for $1.13 per hundredweight less than the same milk would cost if the Dover plant were pooled under Order 4. As a result, the Florence plant enjoys a competitive advantage in the Order 4 market of $1.13 per hundredweight on all milk moved from Dover to Florence which is assigned to Class I. Proponent's witness estimated the volume of such milk to be as much as 2.5 million pounds per month, and asserted that the increased number of producers pooled on the Southeastern Florida market is an indication that Cumberland is pooling increasing volumes of milk at Dover under Order 13 in order to gain a greater advantage in the Order 4 market.

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Although opponents of the proposal deny that the price discrepancy between Orders 4 and 13 at Dover results in any substantial procurement cost advantage for Cumberland, that the advantage impairs competitive equity between handlers, or that it affects a significant amount of milk, examination of the record indicates that Cumberland has a substantial cost advantage on a significant amount of milk, and thereby has the capability of impairing competitive equity in the market.

Under the provisions of the Middle Atlantic and Southeastern Florida milk orders, there is clearly a price advantage of $1.13 at Dover for a plant pooled under Order 13. The costs of operating the Dover supply plant should not be considered as offsetting that advantage. Nearly all of the costs claimed by Cumberland would be incurred in operating the Dover plant under any Federal order. If the Dover plant were an order 4 supply plant, milk received there and used in Class I would be subject to the Order 4 price at that location, $1.13 more than the Class I price applicable under Order 13. No allowance would be made for the extra costs of operating a supply plant. The fact that few or no other plants regulated under Order 4 are subject to the same costs as Dover is because most milk marketed in the Middle Atlantic area is delivered directly from farms to the plants where it is used. The lack of supply plants in the Order 4 market is primarily due to the proximity of producers to the locations at which milk is used. If Cumberland were not operating the Dover plant to ship milk long distance to Florida, most of the milk currently transferred to Florence could be delivered more economically by direct shipments from the farm rather than through a supply plant. The cost of operating a

supply plant is one of the factors implicitly accepted by Cumberland in its decision to use that facility to supply milk to the Riviera Beach plant, and should not be considered as offsetting the Order 13 price advantage at Dover.

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The milk moved from Dover to Florence may represent a small percentage of the total marketed in the Middle Atlantic area, but when Cumberland's $1.13 price advantage is considered the potential disruptive effect of the amount of milk involved is not negligible. If proponent's estimate of the volume of milk in question is reduced by the 5 to 10 percent overestimate claimed by a Cumberland witness, an average of over 35,000 pounds of milk per day has been moved from Dover to Florence since October 1981. This volume would represent the production of approximately 30 of the producers (and 1/4 of the production) pooled under Order 13 at Dover. Such an amount of milk available at a price substantially lower than the Middle Atlantic Federal order Class I price certainly affects the uniformity of pricing to handlers similarly located.

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The record of this hearing does not reveal any problem with respect to the $1.62 per hundredweight location adjustment at the Dover plant with respect to milk moved to Florida. But a substantial price alignment problem exists with respect to the Class I milk disposed of in the Middle Atlantic market from the Dover plant. Use of the Order 13 location adjustment provision to obtain a supply of milk in an other order market, such as the Order 4 market, at a price substantially less than the price applicable under the other order should not be allowed. It is unfair to handlers competing under the other order, and does not provide uniform prices to handlers similarly located.

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The proposal to correct the problem of inequitable pricing in an other order area by amending Order 13 to provide that the Class I price applicable on milk transferred to an other order plant be adjusted for location to a level no lower than the price applicable at that location under the other order is a reasonable and effective method of dealing with the situation. Adoption of the proposal would result in uniform prices paid by handlers regulated by Order 4 and at the same time would not create economic barriers to the movement of milk from Dover to Florida.

Adoption of the proposal would not establish a barrier to movements of milk between Federal order marketing areas. The milk transferred from Dover to Florence does not move between Federal order marketing areas but between plants regulated under different orders but located within the same marketing area. The adopted change would assure uniform pricing of milk to handlers located within

the same area and by that assurance would not inhibit milk transfers between those handlers.

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The number primarily relied upon in adoption of the proposed amendment is the $1.13 per hundredweight price advantage effective at Dover under Order 13 over Order 4 handlers. The reasons for not offsetting that price advantage by Cumberland's costs of operating the Dover supply plant were explained in the recommended decisions. In summary, those costs can be viewed as the cost to Cumberland of balancing the supply for the Riviera Beach distributing plant. Balancing would be one of the functions undertaken by IDFA if the cooperative were supplying Cumberland's plant, and would be one of the components of the over-order price charged by IDFA. It would appear that in addition to not wanting to pay the cooperative to perform balancing and other services, Cumberland also wishes to avoid bearing the cost for supplying those services for its own plants. The effect of allowing the full location adjustment to cover the movement of milk from Dover to Florida for Class I use on milk which is instead transferred to Florence, New Jersey, is to reduce the value of the Order 13 pool at the expense of the Florida producers, who provide most of the milk in that pool. As a result, those producers are required to bear part of the cost of balancing the milk supply for the Riviera Beach plant, for which they supply none of the milk.

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The question of Cumberland as the "target" of the amendment was discussed in the recommended decision. It is difficult to see how adoption of the amendment will discourage the movement of milk from Dover to Florida, or how the amendment could make such transfers uneconomical. The operation of the location adjustment provisions in regard to the milk moved to Florida will be unaffected by the amendment. A requirement that milk sold to an other order handler be subject to the minimum Class I price under the other order should not affect the economics of moving milk from an Order 13 supply plant to an Order 13 distributing plant. - - - -

The Order amendment provisions included in the Assistant Secretary's final decision received producer approval, and became effective August 1, 1983 (48 FR 29672).

21. Pursuant to notice of hearing (48 FR 52318), a public hearing was held on December 6, 1983, at Orlando, Florida, which resulted in identical amendments to the Upper Florida Marketing Order, Order 6 (7 CFR 1006), and to the Tampa Bay Marketing Order, Order 12 (7 CFR 1012). These amendments were effective November 1, 1984 (49 FR 37567), pursuant to a final decision published at 49 FR 30720 (August 1, 1984).

The Deputy Assistant Secretary's final decision reads in part:

The proposal to correct the problem of inequitable pricing in an other order area by amending Orders 6 and 12 to provide that the Class I price applicable on milk transferred to an other order plant be adjusted for location to a level no lower than the price applicable at

that location under the other order is a reasonable and effective method of dealing with the situation. Adoption of the proposal would result in uniform prices paid by handlers regulated by Order 4. It is common practice to incorporate provisions under federal milk orders to ensure that handlers are faced with comparable costs for milk use in Class I irrespective of the source of such milk supply.

Adoption of the proposal would not establish a barrier to movements of milk between federal milk order marketing areas. The milk transferred from Dover to Florence does not move between federal order marketing areas but between plants regulated under different orders but located within the Order 4 marketing area. The adopted change would assure uniform pricing of milk to handlers located within the same area and by that assurance, would not inhibit milk transfers between those handlers.

Cumberland is not the exclusive target of the amendments adopted in this decision. Any handler with a plant located outside Florida but pooled under Order 6 or Order 12 who elects to sell milk for fluid use to nearby plants would be restrained from doing so at less than the local federally regulated price. The facility at Dover could be operated by any handler, even one who could establish a bottling and distributing operation there. Such opportunities for use of federal milk order provisions to obtain a position of competitive advantage in the market should be eliminated.

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We cannot accept the view that Southland, apparently, is acting to force Cumberland to buy milk from IDFA at over-order prices. The fact is that when the Riviera Beach plant is regulated by Orders 6 or 12, Cumberland is provided with a price advantage on its fluid milk sales in Order 4. A similar advantage under Order 13 was eliminated by an amendment effective August 1, 1983, and previously cited herein. As the proponent of the proposals for Orders 6 and 12, Southland has identified the marketing problem and has proffered a reasonable solution. The proposals by Southland are supported by an association representing a substantial number of handlers who are regulated by Orders 2 and 4.

We believe that this view reflects the marketing conditions affecting the proposals to amend Orders 6 and 12. The changes proposed herein would not force Cumberland to buy milk from IDFA or from anyone else. The pricing of milk moved to Florida is not changed by the amendments adopted herein.

Conclusions

1. The contested amendments to Orders 13, 6, and 12 are authorized by Sections 608c(5)(A)(3) and 608(c)(7)(D) of the Act;
2. The contested amendments are supported by substantial evidence in the August 24, 1982, and December 6, 1983, rulemaking hearing records; and
3. The relief requested by petitioner should be denied.

Discussion

I

The location adjustments considered here are those adjustments to uniform class prices which handlers pay for milk, as authorized by Section 608c(5)(A)(3) of the Act, and as construed by the Courts in the following cases:

Schepps Dairy, Inc. v. Bergland, 628 F.2d 11 (CA DC 1979); *Sunny Hill Farms Dairy v. Hardin*, 446 F.2d 1124 (CA 8, 1971); *Fairmont Foods Company v. Hardin*, 442 F.2d 762 (CA DC, 1971); *Wawa Dairy Farms, Inc. v. Wickard*, 149 F.2d 860 (CA 3, 1945); and *Borden Inc. v. Butz*, 544 F.2d 312 (CA 7, 1976).

Other cases cited by petitioner, e.g.: *Blair v. Freeman*, 370 F.2d 229 (CA DC 1966); *Brannan v. Stark*, 342 U.S. 451 (1952); *Smyser v. Block*, 760 F.2d 514 (CA 3, 1985); and *Zuber v. Allen*, 396 U.S. 168 (1969), did not concern the validity of adjustments to the handler uniform class prices. Instead these cases all involved suits by producers which challenged deductions from the producer settlement/equalization fund. Such deductions were for cooperative marketing services, transportation credits, and payments to certain producers located nearer the major milk consumption areas. Further, such deductions reduced the uniform blended price payable to all producers from the producer settlement/equalization fund. In each of these cases, the Courts found no statutory authority to support the deductions.

The general nature and purpose of location adjustments under Section 608c(5)(A) is clear. The courts have described it in essentially the same terms as the Market Administrator did in this proceeding. In *Schepps Dairy Inc. v. Bergland, supra*, the court related:

> Minimum Class I prices, however, are not necessarily uniform across the entire area covered by a milk- marketing order. The requirement of uniform prices is statutorily subject to adjustments 'which compensate or reward the producer for providing an economic service or benefit to the handler.' Milk producing regions covered by an order are often distant from consuming centers, and chief among the adjustments enumerated in the Act is one for 'the locations at which delivery of . . . milk . . . is made to . . . handlers.' The location adjustment honors the fact that a handler who receives milk near consuming centers has a more valuable commodity than a handler who takes in milk in an area further out where it is produced cheaply, but who must undertake the burden of transporting the processed product to consumer markets. It is the nature of the location adjustment that is the focus of this case. 628 F.2d at 15.

Mr. Halnon testified at the hearing in this proceeding as follows: (Tr. pp. 69-71.)

> Q. Now, I want to ask you ------ could you explain what the purpose of location adjustments such as exist in Section 52 of your orders is?
>
> A. Yes. The location adjustments are designed to recognize that milk located at plants distant from the market has a lower value than milk near the market, and the location differentials reduce the amount's price to reflect the lower value at those locations.

XXXXXXXXXXXXXXXXX

Q. Let's back up a step. What does a handler for Class I milk now -- what price -- how is the price that a handler pays determined?

A. Well, we each month announce a Class I price FOB the market.

Q. And would that Class I price be the Minnesota-Wisconsin base price?

A. It's the Minnesota-Wisconsin price, which we call the basic formula price plus a Class I differential that varies order by order.

Q. And if in fact there were no location adjustments applying, that figure would then be the Class I price?

A. Basic formula plus the Class I differential.

Q. And this location adjustment, if it's a negative adjustment such as we talked about here, would be an amount by which the price is reduced to the handler?

A. Reduced on the basis of the location of the plant where the milk was received. Yes.

Q. What other purposes with respect, for instance, to alignment of prices does the location adjustment serve?

A. The Class I differentials specified in the order are ----are established in such a way that it recognizes the value of milk at different locations in themselves.

For example, the Class I differential at Louisville recognizes that plants located in Louisville have milk that is a cheaper source than, say, Florida, which is further from alternative sources, so that the Class I differential serves that purpose and then with interorder, the location differentials then line a price up to reflect the additional -- those reduced values from one market to another following back to alternative sources, so they are kind of tied together.- - - -

In the instant proceeding, Petitioner does not challenge the Secretary's authority to promulgate a location adjustment on milk moving from petitioner's plant at Dover to petitioner's Florida plant, or for that matter, on all milk moving from the Petitioner's Dover plant. Petitioner however challenges the Secretary's authority to adjust or reduce the location allowance on that segment of the Dover milk which does not move to Florida. Petitioner argues that the location allowance, as adjusted by the contested amendments, is a price increase or "surcharge" imposed by the Secretary. This is not so.

The contested order amendments do not impose a price increase or surcharge as petitioner argues. Instead, the order amendments decrease the location allowance on that milk which is surplus to the needs of Florida, and which in fact does not move to Florida. Where the left-over or surplus milk

moves from petitioner's Dover supply plant to its Florence distributing plant, which is regulated under Order No. 4, that milk is priced in accordance with the pricing provisions of Order No. 4.

For example, under the contested amendments, if all of the Dover milk moved to Florida, all of the milk would be priced in accordance with the Florida order uniform pricing provisions, and all of the milk used for Class I purposes would receive the location adjustment. On the other hand, if all of said milk were moved to Florence, all of said milk would then be regulated under Order No. 4 and would be priced in accordance with the Order No. 4 pricing provisions, with Order No. 4 location adjustments applicable.

In the instant case milk moves both ways, the major portion moving to Florida. The contested amendments to the Florida Orders 13, 6, and 12, merely held that the Cumberland milk (or the milk of any other handler) which does not move to Florida and which is transferred instead to an other Order plant, is no longer entitled to the full $1.59 and $1.15 Florida location allowance, since the purpose of such adjustment was to attract milk to Florida. The amendments in dispute do not disturb the allowance on the milk which continues to move to the Florida Federal Orders. The amendments do however reduce the allowance on the milk which does not move to Florida.

This action by the Secretary was not an imposition of a surcharge, but the removal of an allowance or credit on milk which petitioner did not move to Florida. This action by the Secretary was a reasonable exercise of authority and within the necessary and incidental authority conferred by Section 608c(7)(D) of the Act. If the Secretary is authorized to establish location adjustments in accordance with Section 608(c)(5)(A)(3) of the Act, it follows that his authority to modify such allowance, as required by marketing conditions, is necessary, incidental, and not inconsistent with Section 608(c)(5)(A)(3) and in accordance with Section 608c(7)(D).

In the *Smyser* case relied on by petitioner, *Smyser v. Block, supra*, the Court held that the transportation credits to handlers for disposition of the seasonal surpluses of milk were not authorized under 7 U.S.C. 608c(5) or 608c(7)(D). However, the court noted at 760 F.2d 522:

> Our decision today is not intended to vitiate the residual authority granted to the Secretary by §8c(7)(D). The cases are replete with examples of terms that are authorized by this provision. See: *Lawson Milk Co. v. Freeman*, 358 F.2d 647 (6th Cir. 1966) (two-year limitation period on claims by handlers against the market administrator); *General Ice Cream Corp. v. Benson*, 113 F. Supp. 107 (N.D.N.Y. 1953), *aff'd*, 217 F.2d 646 (2nd Cir. 1954) (30-day limitation period on claims for storage cream payments); see also: *Marchezak v. McKinley*, 607 F.2d 37 (3rd Cir. 1979) (Gibbons, J., concurring) (requirement that certain handlers make their producer payments through the market administrator). A cursory glance at any milk marketing order reveals a myriad of terms and conditions necessary to solve the "patently difficult problems of auditing and policing," Kessel, *supra*, 10 J. Law & Econ. at 53, the Act's marketwide sharing mechanisms, but which have no specific basis in the language of the Act. We do not wish to imply that such provisions represent the outer limits of the Secretary's residual authority; nor do we intimate any "bright line" view as to what

the limits of that authority are. We hold only that the transportation credit at issue clearly exceeded those limits.

The present case involves an incidental and necessary modification of the location adjustment, authorized under § 608c(5)(A)(3), to prevent handlers from gaining an unfair competitive edge over other handlers similarly situated. As such, it is a modification authorized by 7 U.S.C. 608c(7)(D). Here there is a "specific basis in the language of the Act."

II

There was substantial evidence in the rulemaking records to support the issuance of the amendments. The Secretary issued the amendments to remove a competitive advantage which petitioner obtained under the Florida Orders. (*See* Findings of Fact 17-20). In both the Order 13 and the Orders 6 and 12 hearings there was extensive testimony demonstrating this competitive advantage which petitioner had over other Order No. 4 handlers on the milk it shipped to Florence, New Jersey.

Each of the hearing records contains substantial evidence to support the findings and conclusions contained in the final decisions of the Assistant Secretary. Each decision carefully recaps the testimony and exhibits of proponents and opponents introduced at the rulemaking hearings, rules on exceptions, and presents the reasons and justifications for the adoption of the contested amendments.

Testimony in support of the proposed amendment to Order 13 contained in the rulemaking transcript of August 24, 1982, appears at pages 59 through 153. Four witnesses testified (direct and cross-examination) and one exhibit (Exhibit 13) was received in evidence. Opposition testimony by three witnesses (direct and cross-examination), was offered at pages 154 through 278, and four exhibits were admitted (Exhibits 14, 15, 16, 17).

A further hearing with respect to amendments to Orders 6 and 12 was held on December 6, 1983, at Orlando, Florida. There, as in the previous 1982 hearing, the record contains testimony and exhibits both in support of and in opposition to the proposed location adjustment amendments.

The rulemaking records demonstrate that Petitioner operates a receiving plant at Dover, Delaware, and ships over 50% of that plant's milk to its distributing plant in Riviera Beach, Florida. Because 50% or more of its distribution is in Florida, the Dover plant is treated as a Florida pool plant. Because Florida is frequently a deficit area the Florida Orders permit negative location adjustments to attract milk to Florida. The amount of the reduction is tied to the distance traveled and makes it economically feasible to ship such distances by permitting the handler to pay in transportation costs what he does not owe the producer pool. The records show that Petitioner in fact shipped large quantities of milk to Florida, sufficient to become regulated under one of the Orders. Petitioner shipped the rest of its Dover milk (the remainder that did not go to Florida) to its distributing plant in Florence, New Jersey, an Order 4, Mid-Atlantic pool plant.

The rulemaking records show that the Dover plant was subject to the *Florida* location adjustment, and petitioner was able to reduce its payments for

its milk going to New Jersey as if it was going to Florida. Petitioner's obligation for its milk sent to New Jersey was approximately $1.10 cwt less than if the Dover plant were pooled in Order 4. All other similarly situated handlers, i.e., handlers in Order 4, operating Order 4 plants and shipping to New Jersey, had to pay this additional $1.10 cwt.

Thus, the records demonstrated an advantage to a handler which was disruptive of orderly marketing. On this basis the Secretary amended the location adjustment provisions of the Florida Orders to restore competitive equity and orderly marketing in Order No. 4. Moreover, the Secretary did this without interfering with the location adjustment's ability to attract milk to Florida, or a Mid-Atlantic handler's ability to ship milk to Florida economically.

These were not hearings at which "testimony of -- witnesses [consisted] of hortatory, conclusory and speculative opinions and predictions" as found by the Court in *Borden, Inc. v. Butz, supra*, at 544 F2d 319. The hearing records reflected a factual situation requiring prompt attention by the Secretary.

III

Petitioner raises other related arguments.

1. Petitioner contends that the amendment established a dual (or multiple) price for Class I milk received by Cumberland at Dover, Delaware: Under Order 13 the Class I price was $1.56 per hundredweight over the basic formula price for Class I milk delivered to Riviera Beach and $2.66 per hundredweight over the basic formula price for Class I milk delivered to Florence, New Jersey. There are presently no other provisions in federal milk orders which establish multiple class prices at the same location for milk regulated under the same order.

This contention is no doubt true. But the enormity of the location allowance (-$1.59) under Order No. 13 on Class I milk that did not move to Florida, is the reason for the unique Order provision. The Secretary acted in Solomon-like fashion and promulgated a reasoned amendment. He preserved Cumberland's allowance on milk that moved to Florida, and preserved the integrity of the Order 4 pricing provisions.

> "Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. . . . Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the variables are too numerous,' he 'fulfills his role when he makes a reasoned' Order. *Mitchell v. Budd*, 350 U.S. 473, 480, 76 S. Ct. 527, 531-532, 100 L. Ed. 565 (1956)." *United States v. Howeth M. Mills, et al.*, 315 F.2d 828, 838 (4th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963).

2. Petitioner argues that the Secretary refused to consider Cumberland's total costs in concluding that there was a competitive problem in the pricing of milk transferred from Dover to Florence.

The Secretary in fact did consider Cumberland's costs (Final Decisions, 48 FR 22303 and 49 FR 30720). Briefly, the Secretary ruled that the costs claimed by petitioner would be incurred in operating the Dover plant under any Order.

Further, such costs are handler business costs, in no way associated with the computation of the value of producer milk used for Class I purposes. This concept is in accord with an earlier decision by the Judicial Officer regarding a handler's claim for costs associated with the use of skim milk powder.

> However, the order only encompasses the payment of minimum prices to producers and is only concerned with the minimum price for the raw material. Premiums which a handler might pay to procure producer milk, in the first instance, to make the powder, the cost of plant operations in connection with the production of the powder, the costs associated with its reconversion back to fluid skim for Class I purposes, and other miscellaneous handling charges, are handler costs above and beyond the scope of the act and the order and are in no way associated with the computation of the value of producer milk used for Class I or Class II purposes. Any reduction in prices to producers to offset such costs would, in effect, charge back to producers a part or perhaps all costs of processing and are no more justified than requiring producers to share the costs of processing and distribution of other fluid milk products. *In re Lyles Dairy Products*, 23 AD 1441, 1450, FN.9 (1964).

Again, in the *Lyles* decision the Judicial Officer noted at page 1455:

> Petitioner, as a business judgment, elected to utilize powder rather than to separate fluid skim milk from producer milk received at its plant. An officer of petitioner testified at the hearing that this was done for purposes of convenience and for the manufacture of a more desirable product. However, producers under the order and competing handlers are not responsible for and need not suffer as a consequence of such business judgment.

3. Petitioner contends that the alleged "surcharge" violates Section 608c(5)(G) of the Act.

This contention is without merit. There is no surcharge. Further, the milk transferred from Dover to Florence does not move between federal order marketing areas. It moves between plants regulated under different orders but located within the Order 4 marketing area. Moreover, petitioner (or any other Florida handler similarly situated) pays, under the amendments, no more than an Order 4 handler shipping to an Order 4 plant.

> The order promulgated by the Secretary obviously does not prohibit Sunny Hill from marketing milk purchased by it in the St. Louis area or, for that matter, in the Memphis or Paducah areas. The order does make it less profitable for Sunny Hill to sell in the St. Louis market than it would be were Sunny Hill not required to pay its producers the fifteen-cent differential. But the differential is specifically authorized by the Act and *reasonable under the circumstances of the case.* It thus cannot be construed as establishing an illegal trade barrier. If all location differentials were to be so construed, nothing would be left of the Secretary's power to promulgate milk marketing orders.

In our view, neither *Lehigh Valley Coop v. United States*, 370 U.S. 76 (1962), nor *Polar Ice Cream & C. Co. v. Andrews*, 375 U.S. 361 (1964), indicate a contrary result, the former because it involved clearly unreasonable compensatory payments and the latter because it involved purchase and allocation requirements imposed upon distributors by a state government. *Sunny Hill Farms Dairy v. Hardin*, *supra*, 446 F.2d at 1131.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Little need be added to the ALJ's decision, which carefully considers and correctly decides the issues involved in this proceeding. Furthermore, location adjustments under the Agricultural Marketing Agreement Act of 1937, as amended, are exhaustively discussed in a 275-page decision in *In re Borden, Inc.*, 46 Agric. Dec. ___ (Sept. 30, 1987), *appeal docketed*, No. 87-2820 (D.D.C. Oct. 20, 1987), attached as an appendix to this decision.

Borden discusses the burden of proof and scope of review (slip op. at 67-76), and explains the different types of location adjustments (slip op. at 76-81). *Borden* examines the legislative history of the Act (slip op. at 90-101), which shows (slip op. at 91-92)--

> that Congress intended for the permitted adjustments to be made for sound economic reasons, such as to recognize differences in the location value of milk because of transportation costs.[11]

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[11] In the absence of the legislative history, it could have been argued that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same order. The legislative history shows that, in addition to meeting the literal language of the Act (by basing a difference in price on a difference in location), the difference in price must also be based on economic benefit to the handler paying a higher price, or economic loss to the handler paying a lower price (see, e.g., *Fairmont Foods* (§ VII(C), *infra*)).

Prior to the amendments at issue here, the Florida orders provided a large, negative location adjustment as to milk that was not actually transported from a surplus area to the Florida deficit area. There was, of course, no sound economic reason for a negative location adjustment with respect to that milk.

Borden sets forth the views of the leading agricultural economists who are experts in the field of dairy marketing (slip op. at 121-32). The experts recognize the "principle of location economics" (slip op. at 124), and "*subscribe to the theory that these transportation differentials [location adjustments] be closely related to actual transport costs*" (slip op. at 125). The Florida location adjustments in effect prior to the amendments, which paid a transportation allowance as if milk were actually transported from Delaware to Florida, when, in fact, it was only transported from Delaware to New Jersey, were not "closely related to actual transport costs," with respect to the milk delivered to New Jersey.

Finally, *Borden* analyzes all of the relevant court decisions involving location adjustments (slip op. at 204-70). *Borden* quotes from *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 767 (D.C. Cir. 1971), explaining that a location

adjustment fitting literally within the definition of a location adjustment is not valid unless there is a relation between the price differential and economic benefit, as follows (slip op. at 215-16):

> To summarize and emphasize, the regulatory scheme results in uniformity among the handlers covered by a milk marketing order, with additional economic burdens being permitted only for economic reasons, to "compensate or reward the producer for providing an economic service of benefit to the handler." *Zuber, supra*, at 184, 90. S.Ct. at 323. This is a sound objective of governmental regulation, and one which the courts are and should be vigilant to preserve. It is for that reason that *Zuber* requires the Secretary to demonstrate, as a prerequisite to imposing the burden of price differentials on handlers, that the burden is imposed for the purpose of reflecting an economic service of benefit to the handler. 23/

23/ The Secretary argues, among other things, that the differentials set by this order are based on the "locations at which delivery * * * is made to * * * handlers," and thus fit within the literal definition of a location adjustment permitted by the Act. 7 U.S.C. § 608c(5)(A)(3). We cannot agree, however, that a mere difference in location is sufficient reason to require one handler to pay higher prices than another governed by the same Order. There must still be some relation between the price differential and economic benefit.

As stated above, prior to the amendments at issue here, there was, of course, no relation between the price differential and economic benefit with respect to that portion of petitioners' milk that was not transported to Florida.

The problem of giving a handler a windfall, by virtue of a negative location adjustment, with respect to all of the handler's milk priced under an order, even though only a portion of the milk actually earns the location adjustment, is not ordinarily of enough consequence to require correction. But the terms of the Act are certainly broad enough to permit (if not to require) the Secretary to correct the situation, and to limit the location adjustment to that milk which actually earns the adjustment, where we are dealing with great distances such as from Delaware to Florida. In fact, as shown above, the legislative history of the Act and judicial construction show that a location adjustment not based on sound economic considerations is not authorized by the Act. There is no sound economic basis for giving petitioners a negative location adjustment as if petitioners had transported the milk from Delaware to Florida when, in fact, petitioners transported it only from Delaware to New Jersey.

For the foregoing reasons, the following order should be issued.[6]

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[6]This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

Order

The relief requested by petitioners is denied.

APPENDIX

In re Borden, Inc., 46 Agric. Dec. ___ (Sept. 30, 1987), *appeal docketed*, No. 87-2820 (D.D.C. Oct. 20, 1987).

In re: GRANVILLE M. "RED" BILLINGSLEY.
A.Q. Docket No. 88-3.
Decision filed March 14, 1988.

Interstate movement of cattle without required certificates and permits--Untimely answer.

Jon Seward, for complainant.
Richard Hardee, Tyler, Texas, for respondent.
Decision issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION GRANTING MOTION FOR ADOPTION OF PROPOSED DECISION

The Complaint in this matter was filed on December 3, 1987. A return receipt indicated that Jean Billingsley received a copy of the Complaint on December 10, 1987. A handwritten note from Respondent dated December 30, 1987, and filed January 6, 1988, stated that Respondent had previously paid a fine to the Texas Animal Health Commission for the alleged violations and requested a hearing in this case.

Complainant filed a Motion for Adoption of Proposed Decision on February 5, 1988. By a written response filed on March 3, 1988, Richard Brooks Hardee, Esq., appeared for Respondent and opposed the motion.

The Motion for Adoption of Proposed Decision is granted. The Complaint was served upon Respondent on December 10, 1987. The response to the motion acknowledges this. Although I find that Respondent's handwritten note of December 30, 1987, constitutes an Answer, the Answer was untimely. That note, although dated December 30, 1987, was not received at the Hearing Clerk's Office until January 6, 1988. Rule of Practice 1.147(d) states, "Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk." Therefore, the Answer was filed 27 days after Respondent received a copy of the Complaint. Since Rule of Practice 1.136(a) requires that an Answer be filed within 20 days after service of the Complaint, the filing of the Answer was untimely.

Although the March 3, 1988, response states that Respondent did not receive a copy of the Rules of Practice with the Complaint, Respondent was notified of the requirement that an Answer must be filed within 20 days of its receipt of a copy of the Complaint, both in the Complaint itself and in the Hearing Clerk's letter that accompanied the Complaint. Therefore, the fact the Rules of Practice may not have been enclosed, does not excuse Respondent's untimely filing of his Answer.

Additionally, it appears that Respondent has not asserted a *bona fide* defense to the Complaint. His defense that he previously paid a fine to the Texas Animal Health Commission for the alleged violation is not a valid defense to the violations alleged in the Complaint.

Accordingly, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Granville M. "Red" Billingsley, herein referred to as the Respondent, is an individual whose address is 406 Kickapoo Street, Frankston, Texas 75763.

2. On or about October 29, 1986, the Respondent moved interstate nine (9) cattle from Bossier City, Louisiana, to Athens, Texas, in violation of section 78.9(d)(3)(ii), of the regulations (9 C.F.R. § 78.9(d)(3)(ii)), in that the nine (9) cattle were not accompanied by a certificate, as required.

3. On or about October 29, 1986, the Respondent moved interstate nine (9) cattle from Bossier City, Louisiana, to Athens, Texas, in violation of section 78.9(d)(3)(ii), of the regulations (9 C.F.R. § 78.9(d)(3)(ii)), in that the nine (9) cattle were not accompanied by a permit for entry, as required.

4. On or about October 29, 1986, the Respondent moved interstate four (4) cattle from Bossier City, Louisiana, to Athens, Texas, in violation of section 78.9(d)(3)(iii), of the regulations (9 C.F.R. § 78.9(d)(3)(iii)), in that the four (4) cattle were not accompanied by a certificate, as required.

5. On or about October 29, 1986, the Respondent moved interstate four (4) cattle from Bossier City, Louisiana, to Athens, Texas, in violation of section 78.9(d)(3)(iii), of the regulations (9 C.F.R. § 78.9(d)(3)(iii)), in that the four (4) cattle were not accompanied by a permit for entry, as required.

6. On or about October 29, 1986, the Respondent moved interstate thirteen (13) cattle from Bossier City, Louisiana, to Athens, Texas, in violation of section 78.9(d) of the regulations (9 C.F.R. § 78.9(d)) in that the thirteen (13) cattle were moved to an unauthorized destination.

Conclusions

Respondent has failed to respond in the required manner to the allegations in the Complaint. By reason of the Findings of Fact set forth above, Respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

Order

Respondent Granville M. "Red" Billingsley is hereby assessed a civil penalty of five thousand dollars ($5,000.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Branch, Butler Square West
5th Floor, 100 North 6th Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to A.Q. Docket No. 88-3.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon Respondent, unless Respondent appeals to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C F.R. § 1.145).

[This Decision became final May 2, 1988.--Editor.]

In re: CHARLES RAY HALEY.
A.Q. Docket No. 328.
Decision filed March 7, 1988.

Interstate movement of cattle without shipper's statement, certificate and entry permit--Failure to respond to material allegations.

Jaru Ruley, for complainant.
Respondent, pro se.
Decision and Order issued by Paul Kane, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the interstate movement of cattle because of brucellosis (9 C.F.R. § § 71.18 and 78.1 *et seq.*), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 9 C.F.R. § § 70.1 *et seq.* and 7 C.F.R. § § 1.130 *et seq.*

This proceeding was instituted by a complaint filed on May 12, 1987, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about July 10, 1985, the respondent moved two cattle, over twenty-four months of age, interstate from the state of Louisiana, to Center, Texas, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18) in that the two cattle were not accompanied interstate by a complete owner's or shipper's statement or other document complying with the regulations. The complaint further alleged that the cattle were moved in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)) in that the cattle were not accompanied by a certificate or by a Permit for Entry as required.

On June 2, 1987, the respondent filed an answer in which he admitted part of the complaint's allegations and failed to respond to the remaining allegations. This failure to respond to part of the allegations contained in the complaint is deemed an admission of those allegations and, along with the respondent's admission of the remaining allegations, constitutes a waiver of hearing. (7 C.F.R. § § 1.136(c) and 1.139).

In his answer, the respondent admits that his truck brought his cattle from Louisiana to Center Auction in Texas where the two cattle in question were "S" branded as required and sold to packers. The answer further states that a weigh bill to center auction was made out by the driver. The answer goes on to state that someone ". . . tried to explain to the inspector that it was legal for cattle to move from Louisiana to Texas as long as a weigh bill was written

showing place of origin and the destination and number of head. . . ." As part of his answer, respondent included a copy of the weigh bill which accompanied the cattle on their movement from Louisiana to Center Auction, Texas. Section 71.18 of the regulations (9 C.F.R. § 71.18) requires an owner's or shipper's statement or other complying document to accompany such an interstate movement and to state, *inter alia*, the identifying numbers of the backtags or other approved identification applied. The weigh bill which accompanied this interstate movement did not list any approved or nonapproved identification for the cattle in question.

The respondent's answer does not respond to the allegations that the cattle were not accompanied interstate by a certificate or Permit for Entry and, therefore, he is deemed to have admitted these facts. It could be argued that by stating in his answer that "it was legal for cattle to move from Louisiana to Texas a long as a weigh bill was written . . . ." the respondent admits that only a weigh bill, not a certificate or Permit for Entry, accompanied the cattle interstate. Under either theory, the respondent is deemed to have admitted the material allegations contained in the complaint and waived a hearing. (7 C.F.R. 1.136(c) and 1.139).

Accordingly, the material facts alleged in the complaint are adopted and set forth herein as the findings of fact, and this decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding. (See 7 C.F.R. § 1.139).

Findings of Fact

1. Respondent, Charles Ray Haley, is an individual whose address is P.O. Box 981, Center, Texas 75935.

2. On or about July 10, 1985, the respondent moved two cattle, over twenty-four months of age, interstate from the state of Louisiana, to Center, Texas, in violation of section 71.18 of the regulations (9 C.F.R. § 71.18) in that the two cattle were not accompanied interstate by a complete owner's or shipper's statement or other document complying with the regulations.

3. On or about July 10, 1985, the respondent moved two cattle, over twenty-four months of age, interstate from the state of Louisiana, to Center, Texas, in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)) in that the two cattle were not accompanied interstate by a certificate containing prescribed information, as required.

4. On or about July 10, 1985, the respondent moved two cattle, over twenty-four months of age, interstate from the state of Louisiana, to Center, Texas, in violation of section 78.9(d)(3)(iii) of the regulations (9 C.F.R. § 78.9(d)(3)(iii)) in that the two cattle were not accompanied interstate by a "Permit for Entry," as required.

Conclusions

By reason of the facts contained in the Findings of Fact above, the espondent has violated sections 71.18 and 78.9(d)(3) of the regulations (9 F.R. § § 71.18 and 78.9(d)(3)).

Therefore, the following Order is issued.

Order

Respondent, Charles Ray Haley, is hereby assessed a civil penalty of one thousand five hundred dollars ($1,500.00). This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order and Supplemental Order became final May 17, 1988.--Editor.]

In re: WARD L. STINE and WESLEY BRATTON.
A.Q. Docket No. 245.
Decision and Order filed March 29, 1988.

Interstate movement of cattle before completion of brucellosis testing - Civil penalty.

Jaru Ruley, for complainant.
Jack Lovette, Bowie, Texas, for respondent Stine.
Decision and Order issued by Edwin S. Bernstein, Administrative Law Judge.

DECISION AND ORDER

This administrative proceeding for the assessment of civil penalties against Respondents was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § § 111 and 120), and the regulations promulgated thereunder (9 C.F.R. § 78.1 *et seq.*) by a Complaint filed on March 12, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. Respondents filed timely Answers. This matter was resolved between Complainant and Wesley Bratton by a Consent Decision, filed on August 1, 1986. Therefore, in this Decision and Order, Ward L. Stine is referred to as "Respondent".

The Complaint alleged that on or about January 24, 1985, Respondents moved 16 postparturient cows interstate from Malaga, New Mexico, to Ringgold, Texas, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not found negative for brucellosis prior to the interstate movement and were not accompanied interstate by a certificate which showed the test date and results of the official brucellosis test, as required. Respondent's Answer, filed on April 17, 1986, admitted that the cattle were moved from New Mexico to Texas, but asserted that neither he nor Mr. Bratton did anything that was not authorized by New Mexico and/or Texas authorities.

An oral hearing was held on October 27, 1987, in Dallas, Texas. At the hearing, Respondent filed an Amended Answer which included an additional defense that Respondent had no responsibility, duty or obligation in

connection with the movement of the cattle. At the hearing, Richard A. Ferris, James B. Ramsey, Leroy A Skinner, Jr., Melvin E. Switzer and M. Dean Reynolds testified for Complainant while Ward L. Stine testified for Respondent. The parties filed proposed findings of fact, proposed conclusions of law and briefs in December, 1987 and January, 1988. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Findings of Fact

Brucellosis is an infectious bacterial disease that can infect cattle as well as sheep, horses, pigs, dogs, and humans. In cattle, it is primarily spread when a cow gives birth to a calf. (Tr. 12-13) The Department of Agriculture has a program designed to combat the disease. This includes requirements that postparturient cattle (cattle that have given birth) be tested for brucellosis and be subject to a health certificate before being moved interstate.

Ward L. Stine (Respondent) is an individual whose mailing address is Box 1226, Bowie, Texas 76230. (Tr. 140) On January 24, 1985, Respondent purchased cattle from Wesley Bratton at the Thompson ranch in Malaga, New Mexico. (Tr. 101, 113) Respondent paid Mr. Bratton in full for the cattle that day. (Tr. 144, 159) Mr. Bratton agreed to pay for inspecting the cattle. (Tr. 160) Included among these cattle were 16 postparturient cows. That day, Melvin E. Switzer, an inspector for the New Mexico Livestock Board, inspected the cattle and issued a Certificate of Livestock Inspection. (Respondent's Exhibit (RX) 3) This document, which Mr. Switzer described as also being a legal bill of sale, stated that the cattle had been sold by Wesley Bratton and consigned to Ward Stine. Mr. Switzer stated that he had prepared the bill of sale at the parties' request. (Tr. 101-102)

At that time, Mr. Switzer told both Mr. Bratton and Mr. Stine that these 16 cows would need entry permits and brucellosis tests before they entered Texas. This was because the cows had already had calves. (Tr. 103)

Mr. Stine then contacted M. Dean Reynolds, a veterinarian in private practice, who visited the Thompson ranch that day. Mr. Stine asked Dr. Reynolds if the doctor could perform a brucellosis card test on the cows. A card test is a screening test. Its advantage is that the results can be obtained quickly. Dr. Reynolds told Mr. Stine that he could not do a card test because he did not have the facilities and, in addition, the New Mexico authorities had requested veterinarians to send all blood to a federal laboratory in Albuquerque for testing. It would take several days to obtain the results from the laboratory in Albuquerque. Dr. Reynolds drew blood from 17 cows, labelled the samples, and completed the necessary form. (Complainant's Exhibit (CX) 2) Since January 24, 1984, was a Thursday and it was too late in the day to mail the blood samples, Dr. Reynolds refrigerated the samples in his office and mailed them on Monday morning, January 28. (Tr. 113-115)

Mr. Bratton gave two checks to Dr. Reynolds in payment for the testing. Dr. Reynolds gave a copy of the form to Mr. Stine which Dr. Reynolds understood Mr. Stine would give to Mr. Stine's truck driver. (Tr. 117-118, 120; RX-4) The form was not complete since it did not include information as to the results of the brucellosis tests. Dr. Reynolds made the receipt for

the testing out to Mr. Stine because he understood that Mr. Stine was the person who requested the tests. (Tr. 133; RX-5)

Mr. Stine had purchased approximately 200 cattle from Mr. Bratton on January 24. Dr. Reynolds told Mr. Stine to keep the cows that were tested separate from the other cattle. When asked if these cows were intermixed, Mr. Stine testified "Very few, if any." (Tr. 145-146) All the cattle were shipped to Ringgold, Texas. They arrived there on January 25, 1985. When the cows arrived, Mr. Stine discovered that one had died. He reported this to Mr. Bratton who sent a check to him for $500 as a refund for that cow. (Tr. 154-155; RX-2) Mr. Stine testified that he understood that Mr. Bratton was to be responsible for having the cattle inspected and for obtaining the necessary health certificates. (Tr. 160)

The health certificates which accompanied the 16 postparturient cows in their shipment from New Mexico to Texas did not show the results of brucellosis tests. (CX-3)

Conclusions of Law

21 U.S. Code § 122 states:

> Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment of not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of Title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

9 C.F.R. § 78.5 states:

> Cattle may not be moved interstate except in compliance with the regulations in this subpart.

9 C.F.R. § 78.9 states in relevant part:

> Cattle which are not test-eligible and are from herds not known to be affected may be moved interstate without further restriction if officially vaccinated as required in section 78.10. Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 as follows:
>
> (b) **Class A States/areas.** Test-eligible cattle which originate in Class A States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be moved interstate from Class A States or areas only as specified below:

(3) **Movement other than in accordance with paragraphs (b)(1) and (2) of this section.** Such cattle may be moved interstate other than in accordance with paragraphs (b)(1) and (2) of this section only if:

* * *

(ii) Such cattle are negative to an official test within 30 days prior to such interstate movement and are accompanied interstate by a certificate which states, in addition to the items specified in § 78.1, the test dates and results of the official tests;

It is undisputed that on January 24, 1985, at the Thompson ranch in Malaga, New Mexico, Respondent Ward L. Stine purchased cattle from Wesley Bratton that included 16 postparturient cows. Mr. Stine and Mr. Bratton were told that the cows were subject to brucellosis testing. Blood was drawn from the cows, however, the tests could not be completed before January 29, 1985. Before the tests were completed, the cows were moved interstate from Malaga, New Mexico to Ringgold, Texas. This movement of the cows before the cows had been found negative for brucellosis and without a health certificate that showed the test date and results of the official brucellosis tests violated 9 C.F.R. § 78.9(b)(3)(ii).

Respondent's defense is predicated upon his argument that he did not have possession and control of the cattle and did not own the cattle until after the cattle arrived at Ringgold, Texas, and were fully accepted by Respondent. In support of this position, Respondent emphasizes that Mr. Bratton paid Dr. Reynolds for the brucellosis testing and that Mr. Bratton paid for all trucking and shipping expenses. In addition, Respondent points to the fact that when one of the cows arrived dead, Mr. Bratton refunded the price of the dead cow to Respondent.

I find that Respondent violated the Act and the regulations in that he moved the cattle from New Mexico to Texas. I do not accept Respondent's argument that title did not pass until the cattle arrived at their destination in Texas and, therefore, Respondent assumed no responsibility in connection with the movement of the cattle. Mr. Switzer, the brand inspector, testified that Mr. Bratton told him that he had sold the cattle to Mr. Stine and, at the parties' request, Mr. Switzer prepared a bill of sale to record the transaction. In addition, Respondent paid Mr. Bratton in full for the cattle at that time. In view of these facts, the fact that Mr. Bratton paid for the inspection and for the transportation does not exculpate Respondent from sharing in the responsibility for moving the cattle in violation of the regulations. Neither does the fact that Mr. Bratton refunded the price of the dead cow to Mr. Stine indicate that title had not passed and that Respondent assumed no responsibility in connection with the cows' movement. It is not unusual for a seller to refund to a purchaser the cost of inadequate merchandise even after title has passed. This is in the nature of a guarantee which can survive the passage of title.

Respondent was present during the preparations for the movement of the cattle. Although knowledge of legal requirements is not necessary to find a violation, in this case Respondent was aware that the cattle should not have been moved until the brucellosis testing had been successfully completed. The

fact that Mr. Bratton also violated the law does not excuse Respondent from his participation in the violation.

The case that Respondent cited in his brief, *United States v. Parks*, 455 F.2d 792 (8th Cir. 1972) does not alter my conclusion that Respondent violated the statute and regulations. That was a criminal case in which a seller was found guilty in connection with the movement of cattle. The case did not indicate whether the purchaser had also violated any law.

I further find that the penalty proposed, a fine of $2,000.00, is appropriate. Brucellosis is a dangerous disease. Sanctions for violations of these regulations must be sufficient to deter others similarly situated from future violations. Therefore, I find that the fine proposed is appropriate.

Order

Respondent Ward L. Stine is assessed a civil penalty of $2,000.00. The penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded to U.S.D.A., APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, MN 55403 within 30 days of the effective date of this Order. This Order shall be final and effective 30 days after the date of service of the copy of the Order upon Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

In re: JAMES W. HICKEY, d/b/a S&S FARMS, and S.S. FARMS, INC.
AWA Docket No. 369.
Decision and Order filed May 27, 1988.

Violations of standards for care of dogs and cats--Failure to allow inspection--Failure to maintain proper records--Administrative procedure--Sanction policy.

The Judicial Officer affirmed Chief Judge Palmer's order suspending respondents' license for 25 years, assessing a civil penalty of $40,000, and directing respondents to cease and desist from numerous practices involving the care and housing of dogs and cats, from failing to allow inspection of respondents' records, and from failing to keep and maintain adequate records as to the acquisition and disposition of dogs and cats. To better prevent the sale of stolen pets, the Act requires animal dealers to keep detailed records. Respondents' deceptive and false records facilitated trafficking in stolen pets, obscured the identity of such animals and compounded the difficulties pet owners and law enforcement officers faced when attempting to trace the movement of stolen animals. The evidence supports the ALJ's findings and conclusions. The procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings, and it is the Department's policy to make no effort to follow them. Issues not raised in a timely manner before the ALJ cannot be raised on appeal. The formalities and technicalities of court pleading are not applicable in administrative proceedings. A jury trial is not required in an administrative disciplinary proceeding. It is not the practice of this Department to reduce sanctions imposed for past violations because of present good conduct. Severe sanction policy explained.

John Griffith, for complainant.
Roger H. Reid, Albany, Oregon, for respondents.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*), and the regulations and standards issued thereunder (9 C.F.R. § 1.1 *et seq.*). On June 17, 1987, (now Chief) Administrative Law Judge Victor W. Palmer (ALJ) issued an initial Decision and Order suspending respondents' license for 25 years, assessing a civil penalty of $40,000, and directing respondents to cease and desist from numerous practices involving the care and housing of dogs and cats, from failing to allow inspection of respondents' records, and from failing to keep and maintain adequate records as to the acquisition and disposition of dogs and cats.

On August 24, 1987, respondents appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[1] The case was referred to the Judicial Officer for decision on September 29, 1987.

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[1]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. § 1.145(d)), was requested by respondents, but is denied inasmuch as the issues are not difficult, the case has been thoroughly briefed, and oral argument would seem to serve no useful purpose.

Based upon a careful consideration of the record, the initial Decision and Order is adopted as the final Decision and Order in this case, with several changes too trivial to itemize. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act (7 U.S.C. § § 2131-2156, the Act) instituted by a complaint filed January 17, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleges that the respondents willfully violated the Act, and the regulations and standards issued under the Act, 9 C.F.R. § 1.1-3.142. An administrative hearing was held before me in Portland, Oregon, on March 24 through 27, 1987. Complainant was represented by John D. Griffith, Esq. Respondents were represented by Roger H. Reid, Esq. and Forrest Reid, Esq. Respondents filed a pre-trial brief and complainant filed its proposed findings and conclusions at the commencement of the hearing. The parties were given until May 8, 1987, to file supplemental briefs which, by request of the parties, was later extended until May 29, 1987.

Upon consideration of the record evidence, the proposed findings, conclusions and briefs, I have concluded that respondents violated the Act, the regulations and the standards, and that an order should be entered requiring respondents to cease and desist from further violations, suspending respondents' license for twenty-five years, and assessing a civil penalty of $40,000.00.

Any proposed finding or conclusion, not incorporated as part of those that follow, has been denied as not in accordance with the credible, material and relevant evidence of record.

Findings of Fact

1. (a) Respondent James W. Hickey is an individual who, at all times material herein, did business as S&S Farms. His principal place of business is located at 34779 Santiam Highway, Lebanon, Oregon 97355.

(b) Respondent Hickey, at all times material herein, was a licensed Class B dealer (No. 92-B-50) under the Act.

2. Mr. Hickey is 59 years old, married, and has resided in Linn County during his entire life except for military service during World War II. He is a high school graduate who has been a rye grass farmer, a cattle rancher, the sole owner of Lebanon Bag Company, Inc., and since 1967 has been raising, buying and selling dogs to west coast research facilities. During 1973, while Linn County was building its own dog pound, Mr. Hickey's facilities on Highway 34 served as the Linn County Dog Shelter.

3. On July 20, 1977, at the time of his original application for a license, respondent Hickey agreed in writing to comply with all applicable regulations and standards. He similarly agreed each year when he applied for a renewal of the license.

4. Respondent S.S. Farms, Inc., also known as S.S. Farms Linn County, Inc., and S&S Farms Linn County, Inc., is an Oregon corporation incorporated on June 17, 1985. Its principal place of business is located at 34779 Santiam Highway, Lebanon, Oregon 97355. Respondent S.S. Farms, Inc., is licensed as a Class B dealer (No. 92-B-50) under the Act.

5. Respondent S.S. Farms, Inc., was organized by respondent Hickey as a successor corporation to his individual business as a dealer under the Act. Respondent S.S. Farms, Inc., is and at all times material herein was, owned, managed, and controlled by respondent Hickey. Respondent Hickey established its policies and directed its activities.

6. On December 20, 1983, respondent James Hickey was sent a warning letter by the APHIS Area Veterinarian-In-Charge respecting deficiencies observed during an inspection of his facilities on August 15, 1983, respecting proper identification of dogs upon acquisition, holding them as required and maintaining the identity of dogs in the records he kept.

7. As specified below, respondents failed to keep and maintain records which fully and correctly disclosed necessary information concerning respondents' purchase of dogs from the Yamhill/McMinnville Dog Pound:

(a) Respondents' records show the purchase of sixteen dogs from the Yamhill/McMinnville Dog Pound on July 30, 1984, when in fact respondents purchased only eight dogs from that pound on that date.

(b) Respondents' records show the purchase of eleven dogs from the Yamhill/McMinnville Dog Pound on July 31, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

(c) Respondents' records show the purchase of seven dogs from the Yamhill/McMinnville Dog Pound on August 6, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

(d) Respondents' records show the purchase of nine dogs from the Yamhill/McMinnville Dog Pound on August 14, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

(e) Respondents' records show the purchase of five dogs from the Yamhill/McMinnville Dog Pound on September 4, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

(f) Respondents' records show the purchase of eleven dogs from the Yamhill/McMinnville Dog Pound on September 7, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

(g) Respondents' records do not show the purchase of dogs from the Yamhill/McMinnville Dog Pound on October 31, 1984, when in fact eight dogs were purchased from that pound by respondents on that date.

(h) Respondents' records show the purchase of a dog from the Yamhill/McMinnville Dog Pound on November 1, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

(i) Respondents' records show the purchase of six dogs from the Yamhill/McMinnville Dog Pound on November 7, 1984, when in fact no dogs were purchased from that pound by respondents that date.

(j) Respondents' records show the purchase of three dogs from the Yamhill/McMinnville Dog Pound on November 9, 1984, when in fact no dogs were purchased from that pound by respondents on that date.

8. As specified below, respondents failed to keep and maintain records which fully and correctly disclosed necessary information concerning respondents' purchase of dogs from the Linn County Dog Control Pound, Albany, Oregon:

(a) Respondents' records do not show the purchase of dogs from the Linn County Dog Pound on March 1, 1985, when in fact six dogs were purchased from that pound by respondents on that date.

(b) Respondents' records show the purchase of three dogs from the Linn County Dog Pound on March 6, 1985, when in fact only two dogs were purchased from that pound by respondents on that date.

(c) Respondents' records show the purchase of six dogs from the Linn County Dog Pound on March 30, 1985, when in fact no dogs were purchased from that pound by respondents on that date.

(d) Respondents' records show the purchase of five dogs from the Linn County Dog Pound on April 3, 1985, when in fact only one dog was purchased from that pound by respondents on that date.

(e) Respondents' records do not show the purchase of dogs from the Linn County Dog Pound on April 5, 1985, when in fact two dogs were purchased from that pound by respondents on that date.

(f) Respondents' records do not show the purchase of dogs from the Linn County Dog Pound on April 8, 1985, when in fact four dogs were purchased from that pound by respondents on that date.

(g) Respondents' records do not show the purchase of dogs from the Linn County Dog Pound on April 12, 1985, when in fact two dogs were purchased from that pound by respondents on that date.

(h) Respondents' records show the purchase of two dogs from the Linn County Dog Pound on April 17, 1985, when in fact no dogs were purchased from that pound by respondents on that date.

(i) Respondents' records show the purchase of four dogs from the Linn County Dog Pound on April 18, 1985, when in fact only two dogs were purchased from that pound on that date.

(j) Respondents' records do not show the purchase of dogs from the Linn County Dog Pound on May 3, 1985, when in fact three dogs were purchased from that pound by respondents on that date.

(k) Respondents' records do not show the purchase of dogs from the Linn County Dog Pound on May 6, 1985, when in fact three dogs were purchased from that pound by respondents on that date.

(l) Respondents' records show the purchase of four dogs from the Linn County Dog Pound on May 7, 1985, when in fact no dogs were purchased from that pound by respondents on that date.

(m) Respondents' records show the purchase of six dogs from the Linn County Dog Pound on May 15, 1985, when in fact only three dogs were purchased from that pound by respondents on that date.

9. As specified below, respondents failed to keep and maintain records which fully and correctly disclosed the necessary information concerning the descriptions and tag numbers of all dogs in respondents' possession and control:

(a) Respondents' records identified a dog with USDA tag number 1627 as a female foxhound, when in fact a male neutered husky-type dog bearing tag number 1627 was found on respondents' premises.

(b) Respondents' records did not show the presence of any airedale-terrier dogs, when in fact an airedale-terrier bearing USDA tag number 1620 was found on respondents' premises.

(c) In connection with the purchase and sale of a golden retriever, respondents' purchase receipt records showed the dog's USDA tag number as 1676. Respondents' sale and disposition records identified this dog by tag number 1684.

(d) Respondents' purchase receipt records identified a spaniel-type dog with tag number 1684. Respondents' sale and disposition records identified a dog bearing the USDA tag number 1684 as a golden retriever.

(e) Respondents' sale records identified a cat with tag number 1628. Respondents' acquisition and holding records make no reference to a cat with tag number 1628.

10. On July 23, 1985, respondents Hickey and S.S. Farms, Inc., were found to have improperly used paper tags instead of official USDA metal or plastic tags, contrary to the regulations, to identify and tag nine dogs in their possession.

11. On or about July 23, 1985, respondents Hickey and S.S. Farms, Inc., refused access to and inspection of their records by APHIS officials and law enforcement officers pertaining to a stolen black labrador pup found at respondents' premises (Tr. 89-91).

12. APHIS inspected respondent Hickey's facility on October 3, 1984, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) Feed storage room was dirty and did not adequately protect food supplies from infestation or contamination from vermin.

(b) Dog shelters were not structurally sound and did not protect the dogs from predators or possible injury.

(c) Watering receptacles had an excessive buildup of algae.

(d) A contaminated dead calf was present in one of the primary enclosures and was being devoured by some of the dogs.

13. APHIS inspected respondent Hickey's facility on October 23, 1984, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) Bedding and food storage facilities still had holes allowing vermin to enter and contaminate food and bedding supplies.

(b) One cat's litter was full and overflowing, another cat was not provided a litter pan.

(c) An outside pen for dogs needed wood shavings or bedding to allow the dogs to be off the mud and remain dry.

14. APHIS inspected respondent Hickey's facility on November 14, 1984, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) The areas where the dogs were kept and housed had scattered trash and broken glass that could cause them physical injury.

(b) The feeder receptacles were caked with contaminated feed.

(c) Dog shelters were not structurally sound and did not protect the dogs from possible injury.

(d) Dogs were not housed in compatible groups in that some injured dogs were housed in the same primary enclosures with healthy dogs.

(e) No suitable method of drainage was provided in the outdoor facilities.

(f) Contaminated dead animal parts were present around the facility.

(g) Shelter was inadequate for dogs kept outdoors when the atmospheric temperature was below 50 ° F. and bedding was inadequate in the facility.

(h) There was a large accumulation of excreta in the kennel area.

(i) Watering receptacles were not kept clean.

15. APHIS inspected respondent Hickey's facility on January 29, 1985, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) Feed was contaminated with rat feces and feed sacks contained holes.

(b) Shelter was inadequate for dogs kept outdoors when the atmospheric temperature was below 50 ° F. and bedding was inadequate in the main kennel.

(c) Feed was contaminated with mold and was in a caked, unpalatable form.

(d) Watering receptacles were not kept clean.

(e) There was an accumulation of excreta in the kennel area.

(f) There was no effective program of pest control.

16. APHIS inspected respondent Hickey's facility on March 13, 1985, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) Food storage and bedding facilities were infested with rat excreta.

(b) Feeding pans were not kept clean.

(c) There was an excessive buildup of excreta in the primary enclosures.

(d) Trash barrels and water buckets were scattered around the premises.

(e) One overly aggressive dog was housed in an enclosure with many other dogs.

17. APHIS inspected respondent Hickey's facility on April 9, 1985, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) Food storage and bedding facilities were infested with rat and mouse excreta.

(b) Sacks of feed were in the barn that did not adequately protect them from infestation and contamination from vermin.

(c) Primary enclosures for dogs were not structurally sound.

(d) Two dogs were tied down by chains which were less than three times the dogs' length.

(e) Several watering receptacles had an excessive buildup of algae.

(f) Bedding in many of the doghouses was wet.

18. APHIS inspected respondent Hickey's facility on May 15, 1985, and found the following violations of section 2.100(a) of the regulations, 9 C.F.R. § 2.100(a), and the standards issued under the Act:

(a) Self feeders were caked with food and needed to be cleaned and kept free of moisture.

(b) Primary enclosures contained an excessive amount of excreta.

(c) A dog was being held in a transport enclosure which was too small to allow the dog to move freely about.

19. Respondents falsely reported the dollar amount of sales on the annual license renewal report, dated June 18, 1984, listing them to be $9,460, when in fact the sales for the period exceeded $37,000.

Conclusions

1. Respondents failed to maintain their facility in compliance with the regulations and standards and thereby willfully violated section 2.100 of the regulations and sections 3.1, 3.3, 3.4, 3.5, 3.6, 3.7, 3.9 and 3.10 of the standards.

2. Respondents falsely reported the dollar amount of sales on the annual license renewal report dated June 18, 1984, and thereby willfully violated section 3 of the Act, 7 U.S.C. § 2133, and section 2.7 of the regulations, 9 C.F.R. § 2.7.

3. Respondents failed to keep and maintain records which fully and correctly disclosed the necessary information concerning all dogs purchased, acquired, held or otherwise in respondents' possession and control, including but not limited to descriptions and tag numbers, and thereby willfully violated section 10 of the Act, 7 U.S.C. § 2140, and section 2.75 of the regulations, 9 C.F.R. § 2.75.

4. Respondents refused to allow the inspection of records on July 23, 1985, and thereby willfully violated section 16 of the Act, 7 U.S.C. § 2146, and section 2.126 of the regulations, 9 C.F.R. § 2.126.

5. Respondents failed to properly identify and tag nine dogs in respondents' possession and control on July 23, 1985, and thereby violated sections 2.50 and 2.51 of the regulations, 9 C.F.R. § § 2.50, 2.51.

6. These violations warrant the issuance of an order requiring respondents to immediately cease and desist from engaging in such practices, suspending respondents' license for twenty-five years and assessing a civil penalty of $40,000.00.

Discussion

The Animal Welfare Act was enacted in 1966 to achieve three objectives:

> "The purposes of this bill, as amended, are (1) to protect the owners of dogs and cats from theft of such pets, (2) to prevent the use or sale of stolen dogs or cats for purposes of research or experimentation and (3) to establish humane standards for the treatment of dogs, cats and certain other animals . . . by animal dealers and medical research facilities." (Senate Report No. 1281, June 15, 1966; 2 U.S. Cong. & Admin. News 66, at 2635.)

In 1976 the Act was amended (Pub L. 94-279) to restate and explain those objectives, which are at the heart of this proceeding.

To better prevent the sale of stolen pets, the Act requires animal dealers to make and keep such records of "the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe". (7 U.S.C. § 2140.) Moreover, dogs and cats must be marked and identified by dealers as specified by the Secretary (7 U.S.C. § 2141).

Congress also directed the Secretary to establish standards for humane care and treatment which dog and cat dealers must observe as the minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, and adequate veterinary care (7 U.S.C. § 2143).

Mr. Hickey both individually and as the alter ego of S&S Farms, Inc., has violated these provisions of the Animal Welfare Act, deliberately, willfully, and cruelly for personal gain and profit.

He was warned on December 20, 1983, that his actions violated the Act, but he continued to improperly mark and identify dogs, to keep records which inadequately showed the identity of the dogs in his possession and to not meet minimum standards for the care and treatment of animals at his facility.

In a previous case involving violations of APHIS requirements designed to thwart those who would traffic in stolen pets, it was pointed out that this objective of the Act may only be attained by strict enforcement and the severe sanction of those who repeatedly violate these requirements. *In re Rudolph Vrana, d/b/a Vrana Research Animals*, 43 Agric. Dec. 1758 (1984).

Here, there is evidence that Mr. Hickey's deceptive and false records facilitated his acquisition of stolen and fraudulently obtained pets found on his premises. His refusal of access to his records pertaining to a stolen labrador pup found on his premises can only be construed as an effort to conceal the way in which he acquired the stolen pet. On one occasion, his records, for the purchase of two dogs with specified tag numbers and a seller's name, matched hearsay evidence presented by Deputy Sheriff John Strong who testified that two thieves he arrested told him that they sold two dogs they had stolen to Hickey for $30.00 who told them: "I don't care if the dogs are hot; I just don't want the cops out here." (Tr. 274.)

This evidence renders implausible Mr. Hickey's explanation that his inability to pay litigation costs was the reason why he entered a plea of nolo contendere to criminal charges that he received a stolen dog.

However, I am not basing the disposition of this proceeding on Hickey's nolo contendere plea in the criminal proceeding or upon any hearsay evidence concerning his purchase of stolen dogs. It is enough that his falsely kept records facilitated trafficking in stolen pets, obscured the identity of such animals and compounded the difficulties pet owners and law enforcement officers faced when they tried to trace the movement of stolen animals to retrieve them.

Obviously, a cease and desist order against such false recordkeeping and animal identification violations is required. Moreover, substantial civil penalties are warranted. To eliminate any ambiguity in the regulations, the

order shall specify that records pertaining to the acquisition or disposition of every dog and cat must be made complete before the close of the business day when the animal was acquired or disposed of by sale or other means.

In 1984, following the 1983 letter of warning, there were ten violations where the purchase of dogs from dog shelters was falsely reported (finding 7) for which a penalty of $200 per violation, or $2000 total, appears appropriate.

In 1985, thirteen similar violations occurred (finding 8), and a higher civil penalty of $500 per violation, or $6500 total, is appropriate.

In respect to five dogs which were incorrectly identified in respondents' records (finding 9), the maximum penalty of $1000 per violation, or $5000 total, is fully warranted and required.

Respondents' use of paper tags for nine dogs in his possession, rather than the type required by the USDA (finding 10), is a lesser offense, but, again, can facilitate deliberate misidentification, and a penalty of $500 is appropriate.

The deliberate refusal of access to respondents' records on July 23, 1985, in denial of a request to inspect them by APHIS officials (finding 11) warrants the imposition of the maximum $1000 penalty.

False underreporting of annual sales in a license renewal report, as Hickey did in his report of June 18, 1984, allows the actual number of animals being bought and sold to be concealed and facilitates trafficking in stolen pets; the maximum penalty of $1000 is required for this proven violation (finding 19).

The remaining findings and conclusions pertain to the way in which Mr. Hickey treated the dogs and cats at his facility.

On October 3, 1983, Dr. David P. Silberman, veterinary medical officer for APHIS, inspected respondents' facility and found twelve dogs in a large pen fouled with feces and urine, trying to feed on a whole dead calf--complete with hide and hooves. He also found that the storage room where feed for the dogs was kept, gave evidence of being vermin infested--it had rat and mice holes and was fouled with rat feces. Doghouses were splintered and in such disrepair they could not be sanitized. There was algae in various water buckets used as the dogs' drinking containers showing that the dogs were not being provided fresh water. *See* finding 12. Inasmuch as these were the first violations of this type brought to respondents' attention, a minimum civil penalty of $100 for each of the four violations, or $400 total, is the appropriate civil penalty, and shall be assessed.

On October 23, 1984, Dr. Silberman reinspected the facility and found that bedding and food storage facilities still had holes allowing vermin to enter. Two other serious humane treatment requirements, identified in finding 13, were found by him to also have been violated. A civil penalty of $600, or $200 per violation, is the appropriate civil penalty for these violations found on the second inspection, and is being assessed.

On November 14, 1984, Dr. Silberman accompanied by another APHIS veterinary medical officer, Dr. Richard Overton, again inspected respondents' facility. This time nine violations, detailed in finding 14, were found to exist. For these violations, civil penalties of $500 per violation, or $4500 total, is appropriate and is being assessed.

On January 29, 1985, Dr. Overton again inspected respondents' facilities and detected six violations, detailed in finding 15, similar to those found on prior inspections. For these violations a civil penalty of $750 per violation, or $4500 total, is appropriate and shall be assessed.

On March 13, 1985, APHIS officials detected five violations of the same type, as detailed in finding 16. On April 9, 1985, six similar violations were detected, detailed in finding 17. And on May 15, 1985, three violations were found as detailed in finding 18. For these violations the maximum civil penalty of $1000 per violation, or $14,000 total, is warranted and is being assessed.

When the penalties from the various violations are added together, the total civil penalty that respondents should be assessed amounts to $40,000.00.

During the hearing, Mr. Hickey tried to mitigate his culpability on the basis of his performance of a valuable and needed community service. He is one of the largest suppliers of dogs to medical laboratories and hospitals in the Northwest. Congress did indeed recognize the importance of medical research when it enacted the Animal Welfare Act. But Congress made it very clear that the dogs that are sold and used for this purpose are entitled to humane treatment and care. This Mr. Hickey did not provide. Moreover, the dogs he sold from time to time included family pets stolen or fraudulently obtained from their owners. There is nothing in the record before me which evokes any feelings of sympathy to warrant mitigation of the penalties that are being imposed.

Complainant's recommendation that respondents' license be suspended for twenty-five years, rather than revoked to better assure that Mr. Hickey will not again deal in dogs and cats, is sound and shall be so ordered.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents contend on appeal that the ALJ "erred in finding that Appellant falsely kept records *to facilitate* trafficking in stolen pets" (Appeal Petition at 1, emphasis added). However, the ALJ made no such finding. Although the ALJ states that "there is evidence that Mr. Hickey's deceptive and false records *facilitated* his acquisition of stolen and fraudulently obtained pets found on his premises" (Initial Decision at 16, emphasis added), the ALJ did not base his sanction on that evidence but, rather, stated (Initial Decision at 17):

> However, I am not basing the disposition of this proceeding on Hickey's nolo contendere plea in the criminal proceeding or upon any hearsay evidence concerning his purchase of stolen dogs. It is enough that his falsely kept records facilitated trafficking in stolen pets, obscured the identity of such animals and compounded the difficulties pet owners and law enforcement officers faced when they tried to trace the movement of stolen animals to retrieve them.

Hence the ALJ concluded that respondents' false records "facilitated trafficking in stolen pets," which is a serious violation irrespective of any intent to actually traffic in stolen animals, but he did not find or conclude that "Appellant falsely kept records *to facilitate* trafficking in stolen pets" (Appeal Petition at 1, emphasis added). In any event, however, if it were necessary to infer that respondents kept false records to facilitate trafficking in stolen

pets, in order to sustain the severe sanction in this case, I would draw that inference from the record in this case.

Respondents challenge some of the ALJ's evidentiary rulings, and the adequacy of the evidence to support some of the ALJ's findings. However, the procedural and evidentiary rules applicable in court proceedings are not applicable in administrative proceedings,[2] and it is the Department's policy to make no effort to follow them.[3] In addition, the proof here far surpasses the preponderance of the evidence, which is all that is required.[4]

Respondents contend that the complaint does not contain an allegation relating to Finding 16(e), which states that "[o]ne overly aggressive dog was housed in an enclosure with many other dogs" on March 13, 1985 (Initial Decision at 12). However, this violation was set forth in the exhibits furnished to respondents prior to the hearing. Complainant's Exhibit 17, p. 2, which was furnished to respondents in advance of the hearing, states, with respect to the March 13, 1985, inspection:

> Deficiency #39 Classification and Separation--An aggressive dog was removed from other dogs during the inspection.

Complainant's proposed Finding K(5), filed at the hearing, contains a finding of fact identical to the ALJ's Finding 16(e) (Proposed Findings of Fact at 13), except that the ALJ omitted the citation to CX 17 and the witnesses who would testify as to this matter. This violation on March 13, 1985, was also discussed in complainant's post-hearing brief, as follows (Memorandum of Points and Authorities at 13):

> Mr. Williams also testified that there was not adequate separation of animals with one aggressive dog in with other dogs. This dog had to be removed by respondent Hickey. Tr. 51; CX 17.

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[2]*Fairbank v. Hardin*, 429 F.2d 264, 267 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970) (summaries of records admissible); *Swift & Co. v. United States*, 317 F.2d 53, 55 (7th Cir. 1963); *Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962); *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); and *see American Beef Packers, Inc. v. USDA*, 486 F.2d 1048, 1049 (8th Cir. 1973); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791-92 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Wall*, 38 Agric. Dec. 1437, 1446 n.4 (1979) (official department publications admissible), *rev'd in part on other grounds*, No. 79-3714 (6th Cir. July 10, 1981) (unpublished decision, not to be cited as precedent), *printed in* 40 Agric. Dec. 927 (1981).

[3]*In re Corona Livestock Auction, Inc.*, 36 Agric. Dec. 1285, 1309-12 (1977), *rev'd on other grounds*, 607 F.2d 811 (9th Cir. 1979); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1222-24 (1977), *aff'd*, 618 F.2d 1329 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980); *In re Hines*, 35 Agric. Dec. 113, 125 n.11 (1976); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 791 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 513 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished).

[4]*See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1346 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.* 614 F.2d 770 (3d Cir. 1980).

Respondents did not request a continuance to meet this evidence. In addition, respondents' post-hearing brief does not raise any question as to the adequacy of the complaint to support that finding of fact. Since respondents failed to raise the issue in a timely manner before the ALJ, it is too late now on appeal to raise this issue.[5] Furthermore, it is well settled that the formalities and technicalities of court pleading are not applicable in administrative proceedings.[6] It is only necessary that the complaint in an administrative proceeding reasonably apprise the litigant of the issues in controversy; any such notice is adequate and satisfies due process in the absence of a showing that some party was misled.[7]

Respondents contend that they were improperly denied a jury trial, as provided by the United States Constitution, but it is well settled that a jury trial is not required in an administrative disciplinary proceeding.

Respondents contend that the ALJ erred in not relying upon mitigating factors, but I agree with the ALJ that there "is nothing in the record before me which evokes any feelings of sympathy to warrant mitigation of the penalties that are being imposed" (Initial Decision at 21). Respondents rely primarily, in this respect, on their alleged good behavior subsequent to the filing of the complaint in this case. But it is the consistent practice of this

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[5]*In re Daul*, 45 Agric. Dec. 556, 565 (1986); *In re Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

[6]*Wallace Corp. v. NLRB*, 323 U.S. 248, 253 (1944); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-44 (1940).

[7]*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350-51 (1938); *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 261-62 (D.C. Cir. 1979); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157, 1161 (5th Cir. 1977); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971); *Bruhn's Freezer Meats of Chicago, Inc. v. USDA*, 438 F.2d 1332, 1342 (8th Cir. 1971); *Swift & Co. v. United States*, 393 F.2d 247, 252-53 (7th Cir. 1968); *Cella v. United States*, 208 F.2d 783, 788-89 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *American Newspaper Pub. Ass'n v. NLRB*, 193 F.2d 782, 799-800 (7th Cir. 1951), *cert. denied sub nom. International Typographical Union v. NLRB*, 344 U.S. 816 (1952); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 36 (D.C. Cir. 1950); *E.B. Muller & Co. v. FTC*, 142 F.2d 511, 518-19 (6th Cir. 1944); *A.E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454-55 (7th Cir. 1943); *NLRB v. Pacific Gas & Elec. Co.*, 118 F.2d 780, 788 (9th Cir. 1941); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1601 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Holcomb*, 35 Agric. Dec. 1165, 1173-74 (1976).

Department not to reduce sanctions imposed for past violations because of post-complaint good conduct.[8]

Respondents contend that the sanctions imposed by the ALJ are too harsh. But they are appropriate, in view of respondents' numerous violations occurring over an extended period of time, after prior warnings. Respondents' violations are the exact type of violations the Act was designed to prevent.

It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g., In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), which is set forth as an appendix to this decision.[9]

For the foregoing reasons, the following order should be issued in this proceeding.

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[8]*In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 235 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Mountainside Butter & Egg Co.*, 38 Agric. Dec. 789, 800 (1978) (remand order), *final decision*, 39 Agric. Dec. 862, 863-64 (1980), *aff'd*, No. 80-3898 (D.N.J. June 23, 1982), *aff'd mem.*, 722 F.2d 733 (3d Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1387-88 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981); *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120 (1978); *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522, 1530 (1977); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 135, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Miller*, 33 Agric. Dec. 53, 62, 81, *aff'd per curiam*, 498 F 2d 1088, 1089 (5th Cir. 1974); and *see In re Catanzaro*, 35 Agric. Dec. 26, 35 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467.

[9]Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1988); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

Order

Respondents shall comply with each and every provision of the Animal Welfare Act, 7 U.S.C. § § 2131-2156, and the regulations and standards issued thereunder, 9 C.F.R. § § 1.1-3.142, and shall cease and desist from any violation thereof. In particular, respondents, their agents and employees, directly or through any corporate device, shall cease and desist from failing to:

1. Maintain primary enclosures which are structurally sound and protect animals from possible injury as required by 9 C.F.R. § § 3.1 and 3.4;
2. Provide adequate storage for food and bedding as required by 9 C.F.R. § 3.1;
3. House dogs in compatible groups as required by 9 C.F.R. § 3.9;
4. Provide adequate shelter for dogs kept outdoors when the atmospheric temperature is below 50° F. as required by 9 C.F.R. § 3.3;
5. Provide clean food receptacles as required by 9 C.F.R. § 3.5;
6. Provide clean watering receptacles as required by 9 C.F.R. § 3.6;
7. Remove debris and excreta from primary enclosures as required by 9 C.F.R. § 3.7;
8. Keep the premises clean and free from trash as required by 9 C.F.R. § 3.7;
9. Provide a suitable method to rapidly eliminate excess water as required by 9 C.F.R. § 3.3;
10. Provide an effective program of pest control as required by 9 C.F.R. § 3.7;
11. Provide adequate primary enclosures as required by 9 C.F.R. § 4;
12. Provide adequate transport enclosures as required by 9 C.F.R. § 12;
13. Allow inspection of respondents' records as required by 7 U.S.C. § 2146 and 9 C.F.R. § 2.126;
14. Keep and maintain records which fully and correctly disclose the necessary information concerning dogs and cats purchased, acquired, held or otherwise in respondents' possession and control, including but not limited to descriptions and tag numbers, as required by 7 U.S.C. § 2140 and 9 C.F.R. § 2.75, and the record of every acquisition or disposition of each dog and cat must be made complete before the end of the business day when the animal was either acquired or disposed of by sale or other means;
15. Accurately report the dollar amount of their sales on every annual license renewal report as required by 7 U.S.C. § 2133 and 9 C.F.R. § 2.7;
16. Properly identify and tag dogs in their possession and control as required by 9 C.F.R. § § 2.50 and 2.51;
17. Provide food to dogs and cats in their possession and control which is wholesome, palatable, of sufficient nutritive value and free from contamination as required by 9 C.F.R. § 3.5; and
18. Provide adequate veterinary care as required by 9 C.F.R. § 10.

Respondents are hereby assessed a civil penalty of $40,000, which shall be paid not later than the 180th day after service of this order, by certified check or money order, made payable to the Treasurer of the United States, and sent to John D. Griffith, Esq., United States Department of Agriculture, Office of

the General Counsel, Room 2014 South Building, Washington, D.C. 20250-1400.

Respondents' license (No. 92-B-50) is suspended for a period of 25 years. During such period of suspension, respondents shall not engage in any activities subject to the Act, whether or not a license would be required.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondents, and the suspension provisions of this order shall become effective on the 30th day after service of this order on respondents.

APPENDIX

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ___, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).

[Excerpt omitted--Editor.]

PACKERS AND STOCKYARDS ACT

DISCIPLINARY DECISIONS

In re: ASSOCIATED FOOD BROKERS, INC., A CORPORATION; ASSOCIATED MEATS, INC., A CORPORATION; BERNIE TOMPKINS, AN INDIVIDUAL; AND CLINT F. BEDSAUL, AN INDIVIDUAL.
P&S Docket No. 6518.
Decision and Order filed April 8, 1988.

Commercial bribery--Disregard of corporate entity.

Thomas Heinz, for complainant.
Richard Ben-Veniste, Washington, D.C., for respondents.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER AS TO RESPONDENT BERNIE TOMPKINS

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereinafter "the Act", initiated by a Complaint and Notice of Hearing filed on April 8, 1985 by the Packers and Stockyards Administration, hereinafter "complainant." The complaint alleged that the corporate respondents, under the management, direction, and control of the individual respondents, made payments to or for the benefit of employees of several retail food chains, including Giant Food of Landover, Maryland, and to an employee of Monfort of Colorado, a meat packing company headquartered in Greeley, Colorado, for the purpose of inducing and influencing these employees to negotiate purchase and sale contracts favoring the corporate respondents. By reason of these facts, the respondents were alleged to have violated sections 202(a), 202(b) and 401 of the Act (7 U.S.C. § § 192(a), 192(b), 221).

Respondents filed an answer admitting that both corporate respondents were engaged in the meat brokerage business and that respondent Bernie Tompkins (hereinafter "respondent Tompkins") was a principal in both corporations. Respondents neither admitted nor denied that the corporate respondents were packers within the meaning of and subject to the provisions of the Act, and went on to deny the remaining substantive allegations of the complaint. Thereafter, on motion of complainant, this proceeding was held in abeyance without date, pending the outcome of an investigation by a Federal grand jury in Baltimore, Maryland. Upon completion of its investigation, the grand jury handed down indictments leading to the conviction of several individuals, including respondent Tompkins.

On April 7, 1988, the undersigned granted two motions, filed by complainant on February 12, 1988: 1) Motion to Take Official Notice and, 2) Motion for Decision and Order on the Pleadings with Regard to Bernie Tompkins. In the granting of the first motion, official notice was taken of the Superseding Information, Judgment and Probation/Commitment Order, and the official transcript of respondent Tompkins' arraignment and sentencing hearing held in the U.S. District Court, District of Maryland, Criminal Docket S-87-0157. The granting of the second motion has resulted in the issuance of this Decision and Order and is based upon the Official U.S. District Court

records in Criminal Docket S-87-0157, as well as affidavits filed in this proceeding by investigators of the Packers and Stockyards Administration, U.S. Department of Agriculture. Copies of court documents are attached hereto as Exhibit A. Affidavits of Louis A. Odom and Lester J. Miller are attached as Exhibits B and C, respectively.[1]

Findings of Fact

1. During the period October 7, 1981 to June 21, 1983, Bobby J. Ingram, a/k/a Bobby Ingram and Bob Ingram, was employed as a beef salesman in the National Sales Office of Monfort of Colorado, Inc., ("Monfort") and was responsible for, among other things, negotiating sales of beef to Associated Meats, Inc. Monfort was a meat packing company which slaughtered cattle and sold fresh beef, known as "boxed beef." (Odom Affidavit p. 3, para. 1; Miller Affidavit, p. 2, para. 1; Superseding Information Count One, paragraphs 1, 2)

2. At all times material hereto, Bernard Tompkins, a/k/a Bernie Tompkins ("respondent Tompkins"), owned a 51 percent interest in, operated and controlled, and was the president of Associated Meats, Inc. ("Associated Meats"), 11215 Oak Leaf Drive, Silver Spring, Maryland. (Odom Affidavit, p. 3, para. 2; Miller Affidavit, p. 3, para. 2; Superseding Information Count One, para. 3)

3. At all times material hereto, Associated Meats was in the business of brokering sales of meat and meat food products (including "boxed beef") to retail food store chains as well as purchasing meat and meat food products (including "boxed beef") for resale to retail food store chains. Giant Food, Inc., Landover, Maryland, ("Giant Food") was a customer of Associated Meats. (Odom Affidavit, p. 3, para. 3; Miller Affidavit, p. 3, para. 3; Superseding Information Count One, para. 4, Count Two, para. 2)

4. At all times material hereto, respondent Tompkins owned, operated and controlled Associated Food Brokers, Inc. ("Associated Food") 11215 Oak Leaf Drive, Silver Spring, Maryland, which brokered meat and poultry sales from meat packers and poultry processors to retail food store chains, including Giant Food. (Odom Affidavit, p. 4, para. 4; Miller Affidavit p. 3, para. 4; Superseding Information Count One, para. 4, Count Two, para. 1)

5. At all times material hereto, Morris Hamberger, a/k/a Morris Hamberg, was the vice president of Giant Food and was responsible for the Meat Department. Among the responsibilities of the Meat Department was the purchase of all meat and poultry for distribution to retail food stores owned and operated by Giant Food in several states and the District of Columbia. (Odom Affidavit, p. 4, para. 5; Miller Affidavit, p. 3, para. 5; Superseding Information Count One, para. 1; Count Two, para. 3)

6. At all times material hereto, Herman L. Pearce, a/k/a Herman Pearce, was the chief meat buyer for Giant Food and reported directly to Morris Hamberger. (Odom Affidavit, p. 4, para. 6; Miller Affidavit, p. 4, para. 6; Superseding Information Count One, para. 2, Count Two, paragraphs 1, 4)

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[1] Morris Hamberger and Bobby J. Ingram were also convicted. An indictment against Herman Pearce was later dismissed upon motion of the Government.

7. (a) From on or about January 11, 1982 to on or about June 14, 1983, respondent Tompkins caused Associated Meats to make secret payments to Bob Ingram at the rates of $50 for each truckload of boxed beef sold to Associated Meats and $20 for each truckload of boxed beef for which Associated Meats brokered the sale.

(b) The secret payments totalled over $19,000 in checks sent in the mail to Bob Ingram's home address. (Odom Affidavit, p. 4, para. 7; Miller Affidavit, p. 4, para. 7; Superseding Information Count One, paragraphs 5, 6, 7B, 7C)

8. To conceal the true nature of the payments made to Bob Ingram, false and misleading books and documents were prepared, in that respondent Tompkins caused the checks to Bob Ingram to be reflected on the books and records of Associated Meats as "commissions" or "consulting fees." (Odom Affidavit, p. 4, para. 8; Miller Affidavit, p. 4, para. 8; Superseding Information Count One, para. 6)

9. Contrary to the published policy of Monfort regarding potential employee conflicts of interest, Bob Ingram failed to disclose to Monfort his receipt of funds from Associated Meats. (Odom Affidavit, p. 5, para. 10; Miller Affidavit, p. 4, para. 10; Superseding Information Count One, paragraphs 3, 6, 7D, 7E,)

10. Respondent Tompkins and Bob Ingram caused Associated Meats to purchase large quantities of beef from Monfort, including over $11 million within the twelve-month period November 1, 1981 through October 31, 1982 and over $7 million in the ten-month period November 1, 1982 through August 31, 1983. (Odom Affidavit, p. 5, para. 11; Miller Affidavit, p. 5, para. 11; Superseding Information Count One, paragraphs 6, 7F)

11. Respondent Tompkins caused the aforementioned secret payments to be made to Bob Ingram for the purpose of influencing Bob Ingram in the performance of his duties by inducing him to negotiate meat sales contracts favoring Associated Meats at the expense of his employer. (Odom Affidavit, p. 5, para. 12; Miller Affidavit, p. 5, para. 12; Superseding Information Count One)

12. From on or before January 1, 1980, to on or about December 31, 1983, respondent Tompkins would and did give, and Morris Hamberger and Herman L. Pearce would and did receive, secret payments and gifts. (Odom Affidavit, p. 5, para. 13; Miller Affidavit, p. 5, para. 13; Superseding Information Count One, paragraphs 5, 6, 7)

13. Respondent Tompkins concealed the true nature of the secret payments and gifts through the creation of false and misleading books and documents, including the following:

(a) Respondent Tompkins caused more than forty-five checks totalling over $72,000.00 to be issued by Associated Food and Associated Meats, which checks were cashed by respondent Tompkins and the cash was paid to, or used for the benefit of, Morris Hamberger and Herman L. Pearce.

(b) Respondent Tompkins caused these checks to be entered on the books and records of Associated Food as personal loans to respondent Tompkins and on the books and records of Associated Meats as loans to officers.

(c) Respondent Tompkins placed and caused to be placed the initials "M.H." for Morris Hamberger or "H.P." for Herman L. Pearce on the check stubs for the checks which were used for the benefit of Morris Hamberger and Herman L. Pearce. (Odom Affidavit, pp. 5-6, para. 14; Miller Affidavit, pp. 5-6, para. 14; Superseding Information Count One, paragraphs 7, 8)

14. Respondent Tompkins paid funds to Morris Hamberger and Herman L. Pearce and expended money on their behalf and did not pay the funds directly to their employer, Giant Food. (Odom Affidavit, p. 6, para. 15; Miller Affidavit, p. 6, para. 15; Superseding Information Count One, paragraphs 8, 9)

15. Respondent Tompkins invoiced Giant Food for meat sales and did not reduce the amounts of the invoices by the amounts of the payments to, or expenditures for, Morris Hamberger and Herman L. Pearce. (Odom Affidavit, p. 6, para. 16; Miller Affidavit, p. 6, para. 16; Superseding Information Count One, paragraphs 9, 10)

16. Several meat packing firms which sold meat to Associated Meats for resale to Giant Food or which sold meat directly to Giant Food in transactions brokered by Associated Food or Associated Meats would have preferred and unsuccessfully attempted to sell directly to Giant Food without going through Associated Food or Associated Meats. (Odom Affidavit, p. 7, para. 19; Superseding Information Count One, para. 10)

17. Respondent Tompkins caused the afore-mentioned secret payments and gifts to be made to Morris Hamberger and Herman L. Pearce to influence them in the performance of their duties at Giant Food by inducing them to purchase meat from or through Associated Food and Associated Meats, more specifically:

(a) Morris Hamberger and Herman L. Pearce used their positions of control in the Meat Department of Giant Food to cause meat packers to use the brokerage services of Associated Food or Associated Meats in order to increase the revenues to Associated Food and Associated Meats by over $800,000 in the time period January 1, 1980 - August 31, 1983.

(b) Morris Hamberger and Herman L. Pearce used their positions of control in the Meat Department of Giant Food to cause Giant Food to purchase meat directly from Associated Meats, so that Giant Food bought over $1.4 million of meat from Associated Meats in the period January 1, 1981 - October 31, 1982; over $9.5 million of meat in the period November 1, 1982 - August 31, 1983. (Odom Affidavit, pp. 7-8, para. 20; Miller Affidavit, pp. 6-7, para. 17; Superseding Information Count One, paragraphs 10, 11)

18. Upon respondent Tompkins' conviction in the United States District Court for the District of Maryland of two counts of mail fraud and aiding and abetting in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2, respondent Tompkins received the following sentence:

> IT IS ADJUDGED, that as to Count Nos. 1 and 2 of the Superseding Information, the imposition of sentence as to imprisonment only is suspended and the defendant is placed on unsupervised probation from the date of Judgment until August 15, 1989, on the general terms and conditions of probation and the following special terms and conditions, to wit: (1) That he pay restitution, pursuant to U.S.C. Title 18, § 3579, directly to Giant Food, Inc., in the amount of Thirty-Six Thousand, Five

Hundred Dollars ($36,500.00), to: Monfort of Colorado in the amount of Ten Thousand, Five Hundred Fifteen Dollars ($10,515.00). Said Restitution to be paid in the following installments within sixty (60) days of the date of Judgment: Twenty Thousand Dollars ($20,000) to Giant Food, Inc.; on or before August 15, 1988, Fifteen Thousand Dollars ($15,000.00) to Giant Food, Inc., and on or before August 15, 1989, Fifteen Hundred Dollars ($1,500.00) to Giant Food, Inc., and Ten Thousand, Five Hundred Fifteen Dollars ($10,515.00) to Monfort of Colorado. (Judgment and Probation/Commitment Order, S-87-0157, U.S.D.C. MD, July 22, 1987)

19. Associated Food and Associated Meats are no longer operating businesses. (Odom Affidavit, p. 8, para. 21; Miller Affidavit, p. 7, para. 18)

Conclusions of Law
Jurisdiction

Section 201 of the Act defines a "packer" as follows:

> When used in this Act, the term "packer" means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of marketing meats, meat food products, or livestock products in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce. (7 U.S.C. § 191)

Associated Food was engaged in the business of brokering meat and poultry sales from meat packers and poultry processors to retail food chains, including Giant Food. (Findings of Fact 4). Associated Meats brokered meat and poultry sales from meat packers and poultry processors to retail food store chains, including Giant Food, and purchased meat from meat packers located in various States for resale to retail food store chains, including Giant Food. (Findings of Fact 3). These activities place Associated Food and Associated Meats within the language of subparagraph c of section 201 of the Act as companies "engaged in the business of...marketing meats...in an unmanufactured form acting as a wholesale broker, dealer, or distributor in commerce" (7 U.S.C. § 191).

Associated Food was solely owned, operated and controlled by respondent Tompkins (Findings of Fact 4). As for Associated Meats, respondent Tompkins was the majority stockholder and controlled the operations of the company (Findings of Fact 2). Under these circumstances, respondent Tompkins is a packer as well as the two corporations. *In re Corn State Meat Co.*, 45 Agric. Dec. 995, 1032-3 (1986); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1048 (1986); *Hedrick v. S. Bonnaccurso & Sons, Inc.*, 466 F. Supp. 1025, 1030-31 (E.D. Pa. 1978); *Fillippo v. S. Bonnaccurso & Sons, Inc.*, 466 F. Supp. 1008, 1015-18 (E.D. Pa. 1978).

Both Associated Food and Associated Meats are defunct corporations. However, it is well settled that the Secretary may, when faced with a defunct corporation, pierce the corporate veil to reach an individual whose position made him responsible for the operation of the corporation. Otherwise, any

order issued by the Secretary would be an exercise in futility. *Sebastopol Meat Co. v. Secretary of Agriculture*, 440 F.2d 983, 983-86 (9th Cir. 1971). This is true even when, unlike the instant case, there is no evidence that the individual was in fact responsible for the specific acts complained of. *Bruhn's Freezer Meats v. USDA*, 438 F.2d 1332, 1342-43 (8th Cir. 1971). *See also, In re Corn State Meat Co.*, 45 Agric. Dec. 995 1032-33 (1986); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034, 1038 (1986); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 397, 401 (1980); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171 (1980); *In re Norwich Veal & Beef, Inc.*, 37 Agric. Dec. 1201, 1205 (1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 566-68 (1977), *aff'd, sub nom., Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978).

Respondent Tompkins has Engaged in Commercial Bribery in Violation of the Act

The respondents in the instant case are charged with an unfair trade practice commonly termed "commercial bribery," which may be defined as "the offer of consideration to another's employee or agent in the expectation that the offeree will, without fully informing his principal, be sufficiently influenced by the offer to favor the offerer." 2 Callman, *The Law of Unfair Competition Trademarks and Monopolies*, § 12.01 (4th ed. 1982). *A fortiori*, the offense has been committed when, as here, money actually changes hands.

It is well settled that commercial bribery is an unfair, unjustly discriminatory, and deceptive practice which violates numerous state and Federal statutes, including the Robinson-Patman amendments to the Clayton Act (15 U.S.C. § 13(c)); (*See, e.g. Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976)); section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) (*See, e.g., American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582 (7th Cir. 1939); and the Travel Act (18 U.S.C. § 1982) which makes it a Federal crime to travel in commerce for the purpose of distributing "the proceeds of any unlawful activity," including bribery in violation of state law." (*See, Perrin v. United States*, 444 U.S. 37 (1979).

Commercial bribery is also a well established offense against section 202 of the Packers and Stockyards Act.[2] *In re Corn State Meat Co., supra*, 45 Agric. Dec. at 1012-13; *In re National Beef Packing Co.*, 36 Agric. Dec. 1722 and cases cited at 1728 (1977), *aff'd*, 605 F.2d 1167 (10th Cir. 1978).

Respondent Tompkins made numerous secret payments to Bobby J. Ingram, to influence Bobby J. Ingram in the performance of his duties as a Monfort salesman of Monfort boxed beef to Associated Meats and to retail food chains for which Associated Meats acted as the broker. Respondent Tompkins also made numerous secret payments and gifts to Morris Hamberger and Herman L. Pearce to influence them in the performance of their duties at Giant Food, for the purpose of obtaining, keeping and

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[2] Section 202 of the Act provides in part that: It shall be unlawful with respect to livestock, meats, meat food products, livestock products in unmanufactured form, poultry, or poultry products for any packer or any live poultry dealer or handler to: (a) Engage in or use any unfair, unjustly discriminatory or deceptive practice or device; or (b) Make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever (7 U.S.C. § 192(a)(b)).

increasing the business of Associated Food Brokers and Associated Meats with Giant Food.

Respondent Tompkins' activities (in conjunction with Bobby J. Ingram and others) caused injury to Monfort in the amount of at least $19,000.00, i.e., the amount of payments made to Bobby J. Ingram. Similarly, respondent Tompkins' activities (in conjunction with Morris Hamberger, Herman Pearce and others) caused injury to Giant Food of at least $72,000.00, the amount of payments made to or for the benefit of Morris Hamberger and Herman Pearce. Commercial bribery of an employee injures the employer by depriving him of maximum obtainable profits. *Grace v. E. J. Kozin*, 538 F.2d 170 (7th Cir. 1976).

The essential elements of commercial bribery are the same as and included within the essential elements of the crimes of which respondent Tompkins has been convicted. Respondent Tompkins therefore has engaged in commercial bribery in violation of section 202 of the Act (7 U.S.C. § 192).

Sanction

Department policy requires imposition of severe sanctions for serious or repeated violations of any regulatory program administered by the Department in order to serve as an effective deterrent not only to respondents, but also to other potential violators. Commercial bribery is an extremely serious violation. *In re Corn State Meat Co., et al., supra*, 45 Agric. Dec. at 1029-30. When determining an appropriate sanction for a violation of the Act, Department policy requires taking into consideration any criminal penalty already imposed for the same violation. *In re Peterman*, 42 Agric. Dec. 1848, 1850 (1983), *aff'd*, 770 F.2d 888 (10th Circuit 1985); *In re Magic Valley Potato Shippers, Inc.*, 40 Agric. Dec. 1557, 1565-68 (1981), *aff'd per curiam*, 702 F.2d 840 (9th Circuit 1983); *In re National Meat Packers, Inc.*, 38 Agric. Dec. 169, 178-79 (1978). As a result of the acts and practices which are the subject of this proceeding, respondent Tompkins is now a convicted felon, and he has been ordered to make restitution payments to Giant Food and Monfort totalling $47,015.00. Although the Act authorizes imposition of civil penalties in addition to the issuance of a cease and desist order, under the circumstances of this case, complainant requests only the issuance of a cease and desist order. (7 U.S.C. § 193(b)). Where a violation of the Act has been found, the Act commands issuance of a cease and desist order.

> If ...the Secretary finds that the packer has violated or is violating the provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and *shall* issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation.... (7 U.S.C. § 193(b)) [emphasis added]

A cease and desist order will be issued even when the violator has ceased his violations or has discontinued his business altogether. *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184, 238-39 (1980); *In re DeJong Packing Co.*, 36 Agric. Dec. 1181, 1218-21 (1977), *aff'd*, 618 F.2d 1329 (9th Circuit),

cert. denied, 449 U.S. 1061 (1980); *In re Roberts Enterprises, Inc.*, 41 Agric. Dec. 80, 83-84 (1982).

Order

Respondent Tompkins, individually or as owner, officer or director of any packer subject to the Act, shall cease and desist from:

(1) Directly or indirectly giving or offering to give, or permitting or causing to be given, money or anything of more than nominal value to, or for the benefit of, any officer, director, agent, employee or representative of any customer or prospective customer as an inducement to influence any such customer or prospective customer to purchase or promote the purchase of meat, meat food products, poultry or poultry products from or through respondent Tompkins; and

(2) Soliciting or accepting favored treatment for respondent Tompkins, or for any customer or prospective customer of respondent Tompkins, through the offer or the gift of money or anything of more than nominal value to, or for the benefit of, any officer, director, agent or employee of a supplier of meat, meat food products, poultry or poultry products to respondent Tompkins or to any customer or prospective customer of respondent Tompkins.

The provisions of this order shall become effective on the first day after service of this order on respondent Tompkins.

[This Decision and Order became final May 19, 1988.--Editor.]

In re: JOHN ED BONE, JOHNNY W. BONE, and DAVID MELVIN BONE.
P&S Docket No. 6846.
Order filed May 16, 1988.

Andrew Y. Stanton, for complainant.
William A. Ratliff, Birmingham, Alabama, for respondent.
Supplemental Order issued by Edward H. McGrail, Administrative Law Judge.

SUPPLEMENTAL ORDER

On March 16, 1988, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act for a period of five years. The order provided that it would be modified upon application to the Packers and Stockyards Administration to permit the salaried employment of John Ed Bone as an employee of Capital Stockyard, Inc., pursuant to employment conditions approved by the Packers and Stockyards Administration, after the expiration of 30 days of the five year period of suspension, and thereafter, until respondents' livestock creditors received payment of about 45 percent of the amounts of their claims, in accordance with the plan of arrangement approved by the bankruptcy court.

Respondent John Ed Bone has applied to the Packers and Stockyards Administration for modification of the March 16, 1988, order to permit him to be a salaried employee of Capital Stockyard, Inc. The conditions set forth in the March 16, 1988, order - the expiration of the initial 30 days of the suspension period, the approval by the Packers and Stockyards Administration

of the terms of employment, and the 45 percent payment to the livestock creditors - have been met. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued March 16, 1988, is modified to permit the salaried employment of John Ed Bone with Capital Stockyard, Inc., with the order remaining in full effect in all other respects.

In re: C.B. LIVESTOCK, INC., TIM MALONEY, CORA RAASCH d/b/a J.C. LIVESTOCK and ALSO AS C.B. LIVESTOCK CO., DALE E. VAN WYK, and VAN'S LIVESTOCK, INC.
P&S Docket No. 6797.
Order filed May 31, 1988.

Ben Bruner, for complainant.
R.M. Van Steenberg, Scottsbluff, Nebraska, for respondent.
Supplemental Order issued by Edwin S. Bernstein, Administrative Law Judge.

SUPPLEMENTAL ORDER

On December 24, 1987, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent Cora Raasch as a registrant under the Act for a period of two (2) years and thereafter until her current liabilities no longer exceed her current assets and she complies fully with the bonding requirements under the Act and the regulations, provided, however, that at any time after 60 days of the suspension has been served, upon application to the Packers and Stockyards Administration, the order may be modified to allow for the salaried employment of Cora Raasch by another registrant.

Respondent Raasch has made appropriate application for modification of the order to allow for her salaried employment by another registrant. As 60 days of the suspension has passed, complainant requests that the order be modified to allow for respondent Raasch's salaried employment by another registrant and that the order remain in effect in all other respects. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued December 24, 1987, is modified so as to allow for the salaried employment of respondent Raasch. The order shall remain in full force and effect in all other respects.

In re: DUNDEE PACKING COMPANY, INC., and RICHARD ZIELINSKI.
P&S Docket No. D 88-1.
Decision and Order filed March 10, 1988.

Failure to pay, when due, for livestock--Issuance of insufficient funds checks--Failure to file answer.

Allan Kahan, for complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a Complaint and Notice of Hearing filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondents wilfully violated the Act.

Copies of the Complaint and Notice of Hearing and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondents by the Hearing Clerk. Respondents were informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the Complaint and Notice of Hearing.

Respondents have failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the Complaint and Notice of Hearing, which are admitted by respondents' failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Dundee Packing Company, Inc., hereinafter referred to as the corporate respondent, is a corporation organized and operating in the State of Illinois. Its business mailing address is Route 72, Box 237, West Dundee, Illinois 60118.

(b) The corporate respondent is, and at all times material herein was:

(1) Engaged in the business of buying livestock in commerce for purposes of slaughter; and

(2) A packer within the meaning of the Act and subject to the provisions of the Act.

(c) Richard Zielinski, hereinafter referred to as the individual respondent, is an individual whose mailing address is 879 Walnut Drive, Sleepy Hollow, Illinois 60118.

(d) The individual respondent is, and at all times material herein was:

(1) President of, and owner of 50% of the stock of the corporate respondent; and

(2) Responsible for the management, direction and control of the practices and activities of the corporate respondent.

(c) The individual respondent is, and at all times material herein was, cr within the meaning of the Act and subject to the provisions of the

(a) The corporate respondent, under the management, direction and l of the individual respondent, in connection with their operations as a , on or about the dates and in the transactions set forth in paragraph the Complaint and Notice of Hearing, and at divers other times, ised livestock and failed to pay, when due, the full purchase price for ivestock.

(b) As of August 25, 1987, there remained unpaid no less than 2.38 for such livestock purchases.

Respondents, in connection with their operations as a packer, on or the dates and in the transactions set forth in paragraph III of the laint and Notice of Hearing, and at divers other times during the period through June 1986, purchased livestock for slaughter and in purported nt therefor, issued checks which were returned unpaid by the bank upon they were drawn because respondents did not have and maintain ent funds on deposit and available in the account from which such ; were to be paid.

Conclusions

reason of the facts found in Findings of Fact 2 and 3 herein, the idents have wilfully violated sections 202(a) and 409 of the Act (7 U.S.C. 2(a), 228b).

Order

e corporate respondent, its officers, directors, agents and employees y or through any corporate or other device, and the individu- ident, in connection with their operations subject to the Act, shall cea sist from:

Failing to pay, when due, the full purchase price of livestock;

Failing to pay the full purchase price of livestock; and

Issuing checks in payment for livestock without having and maintainir ent funds on deposit and available in the bank account upon which suc ; are to be paid.

accordance with section 203(b) of the Act (7 U.S.C. § 193(b)), idents are jointly and severally assessed a civil penalty in the amount of Thousand Dollars ($7,000.00).

e provisions of this order shall become effective on the first^C day after ; of this order on the respondents.

rsuant to the Rules of Practice, this decision becomes final withou r proceedings 35 days after service as provided in sections 1.142 an of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

his Decision and Order became final as to respondent Richard Zielinsl , 1988.--Editor.]

In re: EARL KEUEN d/b/a MOUNT, AUBURN LIVESTOCK.
P&S Docket No. 6609.
Order filed May 10, 1988.

Allan Kahan, for complainant.
Wesley B. Huisinga, Waterloo, Iowa, for respondent.
Supplemental Order issued by Paul Kane, Administrative Law Judge.

SUPPLEMENTAL ORDER

On November 29, 1985, an order was issued in the above-captioned matter which, *inter alia*, suspended respondent as a registrant under the Act.

Respondent has now demonstrated, to the satisfaction of the Packers and Stockyards Administration, that he is no longer insolvent. Accordingly,

IT IS HEREBY ORDERED that the suspension provision of the order issued November 29, 1985, is terminated. The order shall remain in full effect in all other respects.

In re: THOMAS GERALD NIX, d/b/a TOM NIX CATTLE COMPANY.
P&S Docket No. 6900.
Decision and Order filed April 7, 1988.

Failure to pay, when due, for livestock--Issuance of insufficient funds checks--failure to file answer.

Ben Bruner, for complainant.
Respondent, pro se.
Decision and Order issued by Paul N. Kane, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer with the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Thomas Gerald Nix hereinafter referred to as the respondent, is an individual doing business as Tom Nix Cattle Company, whose business mailing address is P.O. Box 149, Anson, Texas 79501.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account and the accounts of others; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account and the accounts of others.

2. (a) The respondent, in connection with his operations subject to the Act, on or about the dates and in the transactions set forth in paragraph II of the complaint, issued checks which were returned unpaid by the bank upon which they were drawn because the respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn to pay such checks when presented.

(b) The respondent, on or about the dates and in the transactions set forth in paragraph II(a) of the complaint, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

(c) As of June 15, 1987, there remained unpaid a total of $250,101.78 for such livestock purchases.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, the respondent has wilfully violated sections 312(a) and 409 of the Act (7 U.S.C. § § 213(a), 228b).

Order

Respondent Thomas Gerald Nix, his agents and employees, directly or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock purchased without having and maintaining sufficient funds on deposit and available in the bank account upon which such checks are drawn to pay such checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

The respondent Thomas Gerald Nix is suspended as a registrant under the Act for a period of five (5) years, provided, however, that at any time after 240 days of this suspension has been served, upon application to the Packers and Stockyards Administration, this order may be modified to allow for the salaried employment of respondent Nix by another registrant, and if restitution of the debts identified in paragraph II(c) of the complaint have been paid in full after 240 days of this suspension has been served, upon application to the Packers and Stockyards Administration the remainder of the 5 year suspension will be terminated.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served on the parties.

[This Decision and Order became final May 23, 1988.--Editor.]

In re: CHARLES PUDLINER, d/b/a PUDLINER'S HOME DRESSED MEATS.
P&S Docket No. 6675.
Decision and Order filed March 28, 1988.

Civil Penalty and Cease and Desist Order.

Respondent was ordered to cease and desist from further violations of the Act, and assessed a civil penalty of $10,000, for violations of the Act relating to failure to pay when due amounts owing for livestock purchased on a hot carcass weight basis; failure to properly and accurately weigh the hot carcasses by reason of an arbitrary 36-pound deduction; and, failure to maintain records which accurately and correctly reflected transactions relating to the purchase and payment for said hot weight carcasses.

Allan Kahan, for complainant.
Richard Greene, Johnson, Pennsylvania, for respondent.
Decision and Order issued by Dorothea A Baker, Administrative Law Judge

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under Title II of the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*). It arises by reason of a complaint having been filed on February 11, 1986, wherein the respondent was charged with violations of the said Act in the following respects:

(1) During the period December 14, 1983 through October 15, 1984, in connection with the purchase of livestock for slaughter, the respondent failed to pay, when due, the full purchase price of such livestock;

(2) In connection with the purchases of livestock on a carcass weight basis during the period May, 1983 through October 15, 1984, the respondent consistently and arbitrarily deducted 36 pounds per carcass, from the actual hot carcass weights of said livestock purchased on a carcass weight basis before computing the final settlement price;

(3) Respondent prepared and issued accountings to the sellers on the basis of the false and inaccurate weights;

(4) Respondent paid the sellers on the basis of such false and inaccurate weights and the respondent's arbitrary deductions from the actual hot carcass weights resulted in substantial underpayments to the sellers of such livestock; and

(5) Respondent during the period from at least January 9, 1984 through October 15, 1984, failed to weigh livestock carcasses to the nearest minimum graduation.

Said practices are alleged to have been in willful violation of sections 202(a), 401 and 409 of the Act (7 U.S.C. § § 192(a), 221, 228b).

On March 4, 1986, the respondent filed an answer and request for hearing wherein the allegations of the complaint were either denied generally or, in more specifics, such as it being averred that on those occasions where time elapsed between the date of delivery or transfer of possession and the date of payment for said livestock, it was due to the carcasses being placed in retention by inspectors assigned to respondent's establishment by the Department of Agriculture, pending laboratory tests if the animal had been under medication, or, pending a determination by said inspector of the extent of bruising or damage to the animal. It was further averred that payment was made as soon as the carcasses were cleared by the inspectors. Further answering the complaint the respondent alleged that in those instances where parts of a specific carcass were bruised upon inspection and not useable, respondent, with the knowledge of the seller, deducted 36 pounds as the nominal weight which in all cases was substantially less than the total bruised and unuseable weight. It was stated that this was done as a convenience both for respondent as well as for the seller and was used only in cases where there was substantial weight loss due to bruised and damaged meat. In addition, the respondent denied that the accountings showed false weights at least to the extent that they benefited respondent in that it was stated that in all instances the benefit went to the seller. Additionally, it was averred that in those specific instances where a deduction was made, the respondent paid more than the seller was entitled to.

An oral hearing was held herein on April 8 and 9, 1987, in Pittsburgh, Pennsylvania, before Administrative Law Judge Dorothea A. Baker. The complainant was represented by Allan R. Kahan, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250, and the respondent was represented by Richard J. Green, Jr., Esquire, 305 Franklin Street, Corner Franklin and Vine, Johnston, Pennsylvania 15901. In due course the parties filed briefs, the last brief having been filed July 31, 1987.

Findings of Fact

1. Mr. Charles Pudliner, hereinafter sometimes referred to as the respondent, is an individual doing business as Pudliner's Home Dressed Meats and whose business mailing address is 167 Norton Road, Johnstown, Pennsylvania 15900.

2. Respondent is, and at all times material herein was, engaged in the business of buying livestock in commerce for purposes of slaughter; and a packer within the meaning of and subject to the provisions of the Act.

3. Section 201.99 of the regulations (9 C.F.R. § 201.99), provides in part that a packer is required when purchasing livestock on a carcass weight basis to make known to the seller, prior to the purchase, the details of the purchase agreement, including a description of the carcass trimmed to be utilized by the packer, the grading to be used, and any special conditions affecting the transactions. In addition, said regulations require that a true written account of the transaction be furnished the seller including all information which affected the final accounting and price, and there is a mandate that settlement and final payment for livestock purchased by a packer on a carcass weight or

carcass grade and weight basis shall be on the basis of the *actual hot carcass weights*. The hooks, rollers, gambrels, or other similar material used at a packing establishment in connection with the weighing of carcasses of the same species of livestock shall be uniform in weight. The tare shall include only the weight of such equipment.

4. Section 409(a) of the Act (7 U.S.C. § 228b) provides, in pertinent part:

> (a) Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: Provided, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: Provided further, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds to place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

5. The respondent's contention that section 409(a) of the Act is inapplicable to cull or downer cows is not legally supportable. This is a legal conclusion and one taken by the Department. However, in fairness to the respondent and for appeal purposes, respondent has raised the legal argument that the statute, section 409(a), does not refer to cull or downer cows, for which payment is governed by the practice that it shall be made if and when the Government veterinarians and inspectors approve and pass the animal.

6. For purposes of this decision, and accepting that the purchase date is the date of approval and release of the animal, such date must be reflected in respondent's records, i.e. identification of the animal, date of retention or nonapproval, date of release, and payment date. This respondent did not do.

7. The respondent and his family have been in the slaughtering business for approximately 50 years. In addition to its slaughtering facilities, respondent operates a retail outlet wherein it sells meats which it has slaughtered. The respondent is a small operation and kills only 20 to 30 cattle a day, on an average. He employs in his business his brother, his daughter, his son-in-law, and two or three other persons. During the times material herein, the respondent was engaged in slaughtering a substantial number of "downer" cattle, a practice which it has since discontinued. Respondent stopped slaughtering downers in August, 1985. A "downer" cow is an animal which is close to death prior to being brought to the slaughterhouse. It is generally acknowledged that such type animal will experience more disease

and/or bruised parts than a healthy animal, frequently requiring greater trimming and boning. Such animals are subject to an ante-mortem and a post-mortem inspection by the assigned veterinarian.

8. Respondent's evidence does not show that on those occasions where time elapsed between the date of slaughter and payment being made that it was due to the carcasses being placed in retention by inspectors pending laboratory tests. Respondent admitted that he does not have anything in his permanent records to indicate which carcasses were retained for further testing. (Tr. 191)

9. Respondent has no notations, accounts, records, and memoranda which disclose why he did not pay for livestock purchased on a carcass weight basis the day after the price was determined.

10. Respondent, from on or about December 14, 1983, through October 15, 1984, in connection with the purchase of 194 head of livestock, more specifically set forth in the complaint, purchased livestock for slaughter and failed to pay, when due, the full purchase price of such livestock. Respondent did not pay for said livestock for as long as forty days after payment for said livestock was due.

11. Complainant's evidence shows that the supervisory Veterinary Medical Officer, who oversaw the Federal meat inspection operation at respondent's plant, was of the opinion that less than one percent of the "downer" animals slaughtered by respondent were retained [although there is evidence that up to about ten percent were retained]; that the test results usually took six days; and, that the carcass test results came in and the carcass was released or condemned on the basis of a phone call. Other evidence indicates that, with rare exceptions, all of the test results on retained animals would be back within ten days. Further evidence shows that the respondent's 1984 annual report indicates that a total of 803 cows and bulls were purchased at respondent's packing plant of which one percent would be eight animals. Even if all the livestock were retained for further testing more than 110 of the animals or approximately 60 percent were paid for beyond the six-day period.

12. Respondent did not keep records of when the carcasses were released.

13. Respondent's failure to pay promptly and in full for livestock purchased is an unfair and deceptive practice in violation of the Act.

14. During the period from at least May, 1983, through October 15, 1984, respondent:

(a) Knowingly used a tare of 50 pounds when weighing livestock carcasses and computing the prices to be paid to the sellers, notwithstanding the fact that the accurate tare for his scale was 14 pounds;

(b) Prepared and issued accountings to the sellers showing the false and inaccurate weights; and

(c) Paid the sellers on the basis of such false and inaccurate weights. Respondent's arbitrary deductions from the actual hot carcass weights resulted in substantial underpayments to the sellers of such livestock in instances where the trimmed and discarded parts were less than 36 pounds.

15. Although the respondent maintains that the Government's tabulation of "downer" cows from which the 36 pound excess tare was taken was not complete, the persuasive evidence of record discloses that respondent did, in

fact, use an arbitrary 36-pound deduction from weight. He did that to accommodate the manner in which the slaughter activities were conducted. The respondent would take the carcasses after they had been skinned and after they had been weighed and send a substantial number (80 to 90 percent) to the "boning room." Because of the nature of such animals and because the likelihood of finding diseased parts inside the animals, which would not be readily discernible until the animal had been cut up, the respondent maintained that it had an agreement with its sellers that it would simply deduct 36 pounds from such an animal representing the additional trimming that resulted from the animals going to the "boning room." The respondent maintained no records as to the amount of unuseable parts which it discarded as a result of the "boning room" operations. Instead it relied upon the 36-pound arbitrary deduction.

16. Although the respondent maintains that a large amount of discarding of unuseable parts occurred in the "boning room" because the veterinarian inspector had to leave at approximately 11 a.m. because he had supervision over 3 other plants, this does not excuse the respondent for failure to pay for the actual amount of weight obtained from the hot carcass, after all trimming and boning. The evidence clearly shows that the respondent used the arbitrary 36 pounds as opposed to the weight of the actual unused parts of the carcass. Although there would be included in the 36-pound deduction a certain amount of trimming and boning, which occurred in the "boning room," he failure of the respondent to keep records precludes a determination as to the actual amount attributable thereto. There is no doubt that there would be instances when the discarded parts would have exceeded 36 pounds, as well as instances when such parts would have weighed less. Respondent's practice was an accommodation to expediency and to the presence of inspecting personnel. In any event, the respondent could not, under the applicable regulations, use the arbitrary 36-pound deduction. This is true, whether or not he and Dr. Lane knew it to be improper.[1]

17. The complainant adduced several witnesses, who were sellers to the respondent who testified, among other things, that they were unaware that the

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[1]As it pertains to use of the 36-pound decrease, which was reflected in the 50 pound tare, Dr. Lane, the supervisor, veterinary medical officer, testified that he first noticed that the tare bar was set at 50 pounds approximately in the early months of 1983, but that:

> A. It really did not dawn on me that I had any responsibility towards this thing because I got kind of a Laissez-faire attitude as far as plant and dealers are concerned. Then it dawned on me that some of these farmers were being paid on the basis of what they were being paid. If it was not the correct amount, then the farmer was being shortened; and the third party was involved.
>
> Q. Laissez-faire attitude, what do you mean by that?
>
> A. Just that I do not feel if this person is trying to take advantage of that one, they are both grown men. They both know their business; and they both know how to look out for themselves . . . . (Tr. 130)

Originally, Dr. Lane was unaware that it was improper to have a 50-pound tare on the scale. Tr. 142, 143)

respondent was arbitrarily deducting 36 pounds from the hot carcass weight. In addition, they testified that they would like to have been paid for the 36 pounds. However, such testimony does not take into consideration that some deduction (more or less than 36 pounds) may have been justified, although not supported by the evidence because of respondent's lack of pertinent records. In addition, said dealers indicated that respondent treated them better than anyone else.

18. Complainant also contends that respondent did not weigh the carcasses to the nearest minimum graduation. It had no direct proof of that, but, instead relied upon inductive conclusions arrived at by statistical analysis. This analysis consists of a tabulation, compiled from invoices of 284 head of livestock, which reflected the last digit of weight.

19. Complainant respectively argues that since respondent weighed the carcasses on a one-pound graduated scale, there was the possibility of the last digit of each weight being distributed from zero to nine, or ten possible outcomes. From such tabulation it was argued that a random pattern did not occur and that respondent did not weigh the carcasses to the nearest minimum graduation.

20. The complainant has not borne its burden of proof with respect to its allegation to the effect that the respondent "rounded off" the weights of the animals. The complainant adduced a witness, not schooled in statistics, who testified that he had examined a number of the transactions (Exhibit No. 13), and that he had computed the percentages of times the numbers zero through nine would be expected to appear as a result of weighing.[2] The witness testified that as a result of his experience and the compilation which he made, and after consulting a book in statistics, he concluded that the respondent was "rounding off" his weights. This would mean that if an animal weighed 598 pounds, allegedly the respondent would reflect that as 600 pounds; whereas, if an animal weighed 592 pounds the animal's weight would be given as 590 pounds. There is insufficient evidence of record to find that the complainant's allegation in this regard is supported. For instance, it was not shown the sample sizes where the conclusions reached by the complainant's witness would be valid, nor was it shown the degree of error which might be expected in any given sample size.

21. The complainant has failed to show that the respondent during the period from at least January 9, 1984, through October 15, 1984, failed to weigh livestock carcasses to the nearest minimum graduation.

22. Relative to its allegation of failure to weigh on accurate and proper weights, the complainant prepared an exhibit which reflects computations made by Mrs. Ruddon[3] relative to the weights of rollers. The respondent indicated that each of his rollers weighed 7 pounds. Complainant argues that

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[2]The witness expectation was "basically for ten percent for each number for each digit." (Tr. 18)

[3]Mrs. Ruddon was first assigned to respondent's facility in July, 1983, and she discontinued working November 9, 1984. (Tr. 61)

hooks and rollers used for hot dressed weight must be standardized to a plus or minus 2-ounce variance in order to achieve uniformity in weight. The compilation made by Mrs. Ruddon reflects variances beyond the 2-ounce tolerance and as much as 2 pounds, 3 ounces. Respondent disputes the accuracy of this tabulation and the credibility of Mrs. Ruddon and points out that it was not shown that the 50 hooks and rollers out of 100 were those used by respondent. Also, the rollers were weighed on the respondent's kill scale which had a minimum graduation of 1 pound. (Tr. 77) Mrs. Ruddon testified that she arrived at the respondent's facility early in the morning and during the periods reflected in her compilation she climbed a ladder, obtained the rollers, and weighed them on the respondent's kill scale. The respondent raises questions as to whether or not this could have been done by said witness. Mrs. Ruddon's testimony indicates a considerable degree of unfamiliarity with respondent's business, such as she was unable to state accurately and assuredly the percentage of "downer" cattle which were killed at the respondent's facility although she had been assigned to that facility over a substantial period of time.[4]

The record as a whole, including the testimony of Mrs. Ruddon, is not of such a convincing nature as to warrant the factual conclusions sought by the complainant. The sample number of hooks and rollers weighed by Mrs. Ruddon were not identified and there is no way of knowing if some which she said she tested were those "laid aside" by respondent, and supposedly not used. It is possible respondent did not use all of the sampled hooks.

23. Complainant has not borne its burden of proof by clear and convincing evidence that, at times material herein, respondent weighed the carcasses using nonstandardized hooks and rollers; nor has complainant shown nonuniformity in weight when weighing animals because respondent used hooks and rollers which were not uniform in weight.

24. The record as a whole shows that the respondent failed to pay when due amounts owing for livestock purchased on a hot carcass weight basis; that the respondent failed to properly and accurately weigh the hot carcasses by eason of an arbitrary 36-pound deduction; and that the respondent's records d not accurately and correctly reflect the transactions relating to the rchase and payment for said hot weight carcasses.

These are violations of the Act and the regulations.

Conclusions

The respondent's failure to pay, when due, the full purchase price of livestock and the respondent's arbitrary deduction of 36 pounds per carcass, as set forth herein, are serious violations of the Packers and Stockyards Act (§ 409(a)) and the regulations promulgated thereunder.

Also, respondent did not keep adequate records, particularly those which would have disclosed when the carcasses were released.

It has been consistently held that failure to pay promptly and in full for livestock purchased is an unfair and deceptive practice in violation of the Act.

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[4]Mrs. Ruddon's supervisor, Dr. Lane, indicated that respondent was averaging 20-40 owners per week and less than 1 percent were retained (Tr. 129), with 30 to 40 percent quiring "additional" trimming. (Tr. 131)

In re: Thomaston Beef and Veal, Inc., 39 Agric. Dec. 171 (1980); *In re: DeJong Packing Co*, 36 Agric. Dec. 1181, *aff'd* 618 F.2d 1329 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980); *In re: Sebastopol Meat Company, Inc.*, 28 Agric. Dec. 435 (1969).

The evidence shows that respondent purchased livestock on a carcass weight basis and weighed the carcasses with a tare setting in excess of the weight of the hooks and rollers attached to the carcass in violation of section 202(a) of the Act (7 U.S.C. § 192(a)) and section 201.99(d) of the regulations. *In re: Union Packing Company of Omaha*, 42 Agric. Dec. 560 (1983); *In re: Volda, Inc. et al.*, 41 Agric. Dec. 72 (1982); *In re: Superior Brand Meats Inc.*, 39 Agric. Dec. 927 (1980); *In re: Linden Packing Co., Inc.*, P&S Docket No. 6536 (Apr. 7, 1986).

Complainant seeks an order requiring the respondent to cease and desist from the violations found to have been committed, as well as the imposition of a civil penalty in the amount of Forty Thousand Dollars ($40,000.00).

It is self evident that respondent should be ordered to cease and desist from his practices which are in violation of the Act and regulations. Such an order is specifically provided for by section 203(b) of the Act (7 U.S.C. § 193(b)) and has been issued in all the cases in which respondents were found to have violated section 202(a) of the Act.

Section 203(b) of the Act further provides that in addition to the cease and desist order provided under said section, "the Secretary may also assess a civil penalty of not more than $10,000.00 for each such violation. In determining the amount of the civil penalty to be assessed under this section, the Secretary shall consider the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue business."

The Judicial Officer is the final deciding authority for the Secretary and has announced the Department's policy in regard to sanctions. He has indicated that he gives consideration and weight to the recommendation of the administrative officials - here, the Packers and Stockyards Administration - and, the cases reflect that there resides in the Judicial Officer the authority to increase the sanctions, to accept the recommendations of the administrative officials, or to otherwise impose a sanction which reflects the Department's sanction policy.

The Complainant maintains that the requested sanction is consistent with the only litigated decision involving the same issues, *In re: Linden Packing Co., Inc.*, P&S Docket No. 6536 (Apr. 7, 1986), a copy of which decision is attached to complainant's brief. In *Linden*, the respondent was assessed a civil penalty of $20,000.00. It is argued that although *Linden* involved a significantly larger packer, with more than forty times the annual sales of respondent Pudliner, respondent's excessive tare of 36 pounds was *seven times* the excessive tare in *Linden*, and resulted in an average loss of *more than $20.00 per animal* to the sellers. This analysis can only be valid on the assumption that the respondent was not entitled to deduct the *actual* pounds attributable to the trimmed, boned, and discarded parts. Respondent did not have to pay for discarded parts. Unfortunately, he did not keep records to show this.

The Secretary considers respondent's practices as constituting most serious violations of the Act. Although the evidence discloses that all the sellers were eventually paid within 40 days, respondent's practice of failing to pay, when due, potentially jeopardized the sellers being paid at all. Experience with the industry has shown that slow payment for livestock is frequently a precursor to nonpayment and is usually part and parcel of a minimal or deteriorating financial condition on the part of the purchaser. In addition, slow payment serves to dilute the financial protection afforded sellers by the packer's bond and the statutory trust.

Respondent's practice of not paying sellers of livestock 36 pounds by use of an undisclosed and excessive tare constitutes, in the testimony of Mr. Paul Peterson, Assistant to the Chief of the Scales and Weighing Branch, Livestock Marketing Division Packers and Stockyards Administration:

> . . . an unfair, unjustly discriminatory and deceptive practice. As a result, it would be considered a very serious violation of the Act . . . . the provider of the livestock is not being paid for the value of his livestock . . . to protect the producer of livestock from such practices.

As Mr. Peterson explained, on behalf of the Administration, the price of livestock is based on the quantity of the product (in this case weight) times the quality or value of the livestock. The quantity of the product is a scientific fact, a matter of weighing the product. The value is a relative fact, subject to the agreement of the buyer and seller based, in large part, on market conditions and quality. When you alter the weight, you reduce the payment for the livestock being offered and the producer ultimately receives less than the value of the livestock which is rightfully due him.

Respondent's preparation and issuance of accounts showing the false and inaccurate weights, also alleged and proven by the evidence, is a continuation of the unfair and deceptive practice, which gives the purported weight greater legitimacy in the mind of the seller, and is a violation of section 401 of the Act (7 U.S.C. § 221). *In re: Muehlenthaler*, 37 Agric. Dec. 313, *aff'd sub nom., Muehlenthaler v. USDA*, 590 F.2d 340 (8th Cir. 1978); *In re: Miller*, 33 Agric. Dec. 53, *aff'd sub nom., Miller v. Butz*, 498 F.2d 1088 (5th Cir. 1974).

The second factor the Secretary is to consider in determining the size of the civil penalty is the size of respondent's business. The annual report of respondent for the calendar year 1985 showed net sales of $1,654,459.00; and for 1984 it showed net sales of $1,832,484.00.

The third and final factor for the Secretary to consider is the respondent's ability to continue in business if a civil penalty is imposed. An examination of the Annual Report respondent filed for calendar year discloses that at the end of the year respondent had retained earnings of $186,031.00; operating income of $17,452.00; interest income of $13,326.00 for a total income of $30,778.00. If the retained earnings earned a rate of return of approximately 7.5%, the interest earned would be very close to the amount of interest respondent earned in 1985.

It is argued by complainant that although respondent does not have income from the business sufficient to pay the requested civil penalty in one payment, his retained earnings are sufficient for him to be able to pay the civil penalty in full and still be left with more than $140,000.00 in retained earnings. Such

remaining amount would generate almost $11,000.00 in interest income at 7.5% interest.

With all the above concerns of complainant considered, reference is made to the Judicial Officer's most recent case of *Floyd Stanley White*, P&S Docket No. 6472 (Jan. 11, 1988), involving false weighing of hogs. The Department's Judicial Officer's sanction therein was a 9-month suspension and a $10,000.00 civil penalty.

A careful review of the entire record herein indicates a civil penalty of $10,000.00 and a cease and desist order are appropriate sanctions against this respondent. Such sanctions are in accord with the Judicial Officer's severe sanction policy and will accomplish the purposes he has set forth. In addition, the Government has failed to sustain its burden of proof with respect to certain allegations. Also this case involves 1983-1984 violations and fairness would indicate that respondent's sanction should be in keeping with all cases previously decided and applicable thereto where lesser sanctions were imposed. In addition, this proceeding involves cull or downer cows, which, although handled somewhat differently, are not specifically covered in the regulations.

Order

Respondent Charles Pudliner, his agents and employees, directly or through any corporate or other device, shall cease and desist from:

1. Failing to pay, when due, the full purchase price of livestock;
2. Failing to install, maintain,and operate any livestock or monorail scale owned or controlled by him in such a manner as to insure accurate and correct weights;
3. Operating any monorail scale owned or controlled by him unless the hooks, rollers, gambrels or other similar equipment used in connection with the weighing of carcasses of the same species of livestock are of uniform weight and the scale's tare has been adjusted and set to include only the weight of such equipment;
4. Failing to account and make final payment for livestock purchased on a carcass weight basis on the actual hot carcass weights of such livestock;
5. Weighing livestock, livestock carcasses or parts thereof at other than their true and correct weights;
6. Recording inaccurate or incorrect weights on hot scale sheets or kill sheets, on accountings issued to the sellers of livestock, on carcass tags, or on any other record or document which purports to show the hot weight of livestock carcasses or parts thereof;
7. Paying the sellers of livestock, livestock carcasses or parts thereof on the basis of inaccurate or incorrect weights;
8. Failing to disclose to the sellers of livestock on a carcass weight or carcass grade and weight basis, prior to the purchase of such livestock, complete and accurate details of the purchase contract, including the expected date and place of slaughter, carcass price, condemnation terms, description of the carcass trim, and the grading to be used;

9. Taking any unauthorized or unsupported deductions from the hot carcass weights on livestock purchased on a carcass weight or carcass grade and weight basis; and

10. Failing to prepare and issue to the sellers of livestock on a carcass weight or carcass grade and weight basis a true and correct written account of each transaction showing the number, weight and price of carcasses of each grade and of the ungraded carcasses, the number of condemnations and the explanation for any such condemnations, the explanation for any adjustments made in the determination of the final purchase amount, and such other facts as may be necessary to show fully the true and correct nature of each transaction.

Respondent shall keep and maintain accounts, records and memoranda which completely and accurately disclose the nature of all transactions involved in his business as a packer, including: (1) hot scale sheets, kill sheets, hot carcass weight tags or other comparable records sufficient to show the individual carcass weights and the identity of the seller of livestock purchased by respondents on a carcass weight or carcass grade and weight basis; (2) accounts of purchase, invoices or other documents issued to the sellers of livestock on a carcass weight or carcass grade and weight basis showing the number of head, hot carcass weights and prices of each grade and of ungraded carcasses, the number of condemnations, the explanation for such condemnations and for any adjustments made in determining the final purchase amount, and such other facts as may be necessary to show the true and correct nature of each transaction.

Respondents shall keep and maintain a record of all complaints received from the sellers of livestock on a live weight, a carcass weight or a carcass grade and weight basis, concerning or related to respondent's weight of livestock and livestock carcasses, and payment thereof, for a period of two years after such complaint is received,including, but not limited to the following information:

(1) name and address of the complaining sellers;
(2) date of receipt of the complaint;
(3) transaction about which the complaint is received;
(4) exact nature of the complaint and its disposition; and
(5) date of disposition.

Respondent shall deliver a copy of this decision and order to all of his personnel whose duties or responsibilities include the purchase of livestock for slaughter, the operation of livestock or monorail scales, the weighing of livestock or livestock carcasses, and the accounting to and payment of the sellers of livestock.

Respondent Charles Pudliner is assessed a civil penalty in the amount of Ten Thousand Dollars ($10,000.00).

All requests, motions and suggestions of the parties have been given due consideration and to the extent, if any, not ruled upon and which are inconsistent with this decision, they are denied.

This Decision and Order shall become final Thirty five (35) days after service unless appealed within Thirty (30) days to the Judicial Officer as provided for in the Rules of Practice and Procedure, (7 C.F.R. § 1.131 *et seq.*).

Copies hereof shall be served upon the parties.

[This Decision and Order became final May 9, 1988.--Editor.]

In re: MIKE ROBERTSON.
P&S Docket No. 6945.
Decision and Order filed May 27, 1988.

Market agency - Bonding requirement - Suspension of registration - Civil penalty.

The Judicial Officer affirmed Chief Judge Palmer's order requiring respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent. The order also suspends respondent as a registrant under the Act until he complies with the bonding requirements, and assesses a $500 civil penalty. A respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Even if respondent were permitted to file a late answer, it would not affect the outcome of this proceeding. Continued operation without a bond, even though active efforts were being made to obtain the bond, is a serious violation of the Act.

Sharlene Lassiter, for complainant.
Respondent, pro se.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).[1] An initial Decision and Order was filed on January 12, 1988, by Chief Administrative Law Judge Victor W. Palmer (ALJ) ordering respondent to cease and desist from engaging in business without filing and maintaining an adequate bond or its equivalent. The order also suspends respondent as a registrant under the Act until he complies with the bonding requirements, and assesses a $500 civil penalty.

On February 19, 1988, respondent appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the

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[1]*See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural Law, ch. 71 (1980).

Department's cases subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).[2] The case was referred to the Judicial Officer for decision on May 19, 1988.

Based upon a careful consideration of the entire record, the initial Decision and Order is adopted as the final Decision and Order in this case, except that the effective date of the order is changed in view of the appeal, and the method of paying the civil penalty is specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and the regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served on the respondent by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Mike Robertson, doing business as Robertson Horse Sales, hereinafter referred to as the respondent, is an individual with a business mailing address at P.O. Box 522, Benson, Arizona 85602.

(b) The respondent is, and at all times material herein was:

(1) Engaged in the business of a market agency selling livestock in commerce on a commission basis; and

(2) Registered with the Secretary of Agriculture as a market agency to sell livestock in commerce on a commission basis.

2. Respondent was notified by certified letter received June 9, 1987, that the bond he maintained to secure the performance of his livestock obligations under the Act would terminate on June 21, 1987. Respondent was further informed that if he continued his livestock operations under the Act without providing adequate bond coverage or its equivalent, he would be in violation

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent has continued to engage in the business of a market agency selling livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the act and the regulations.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. § § 201.29, 201.30).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Under the Department's rules of practice governing formal adjudicatory administrative proceedings instituted by the Secretary, a respondent's failure to file a timely answer or deny the allegations of the complaint constitutes an admission of the allegations in the complaint and a waiver of hearing. Specifically, the rules of practice provide (7 C.F.R. § § 1.136(a)-(c), .139, .141(a)):

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. . . .

(b) *Contents.* The answer shall: (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

. . . .

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall

constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk.

Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

. . . .

§ 1.141 Procedure for Hearing.

(a) *Request for Hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

The complaint contains allegations identical to the findings of fact, *supra* and states (Complaint at 2):

The respondent shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

In addition, the letter from the Hearing Clerk serving a copy of th complaint on respondent expressly and accurately advised respondent of th effect of failure to file an answer or plead specifically to any allegation of th complaint. The letter states:

In accordance with the rules of practice governing proceedings under the Act, a copy of which is enclosed, you will have 20 days from the receipt of this letter within which to file with the Hearing Clerk an original and *three* copies of your answer. Your answer should contain a definite statement of the facts which constitute the grounds of defense, and should specifically admit, deny or explain each of the allegations of the complaint. Failure to file an answer to or plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

Within the same time allowed for the filing of your answer, you may, if you wish, request an oral hearing. Failure to file such a request will constitute a waiver, on your part, of oral hearing.

After respondent failed to answer the complaint within 20 days, th Hearing Clerk notified respondent by a letter dated September 28, 1987, tha his answer had not been timely filed. Even when served with complainant'

November 30, 1987, Motion for Adoption of Proposed Decision, respondent did not file any response. Accordingly, the default order was properly issued in this case. Although on rare occasions default decisions have been set aside for good cause shown or where complainant did not object,[3] respondent has shown no basis for setting aside the default decision here.[4]

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[3]*In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (remand order), *final decision*, 42 Agric. Dec. 1173 (1983) (default decision set aside because service of the complaint by registered and regular mail was returned as undeliverable, and respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted); *In re J Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (remand order), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Christ*, L.A.W.A. Docket No. 24 (Nov. 12, 1974) (remand order), *final decision*, 35 Agric. Dec. 195 (1976); and *see In re Gallop*, 40 Agric. Dec. 217 (order vacating default decision) (case remanded to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981).

[4]*See In re Morgantown Produce, Inc.*, 47 Agric. Dec. ____ (Feb. 22, 1988) (default order proper where answer not filed); *In re Johnson-Halifax, Inc.*, 47 Agric. Dec. ____ (Feb. 22, 1988) (default order proper where answer not filed); *In re Charton*, 46 Agric. Dec. ____ (July 13, 1987) (default order proper where answer not filed); *In re Bejarano*, 46 Agric. Dec. ____ (June 22, 1987) (default order proper where timely answer not filed; respondent properly served even though his sister, who signed for the complaint, forgot to give it to him until after the 20-day period had expired); *In re Zedric*, 46 Agric. Dec. ____ (June 10, 1987) (default order proper where timely answer not filed); *In re Schmidt & Son, Inc.*, 46 Agric. Dec. ____ (Apr. 6, 1987) (default order proper where timely answer not filed); *In re Carter*, 46 Agric. Dec. ____ (Mar. 3, 1987) (default order proper where timely answer not filed; respondent properly served where complaint sent to his last known address was signed for by someone); *In re McDaniel*, 45 Agric. Dec. 2255 (1986) (default order proper where timely answer not filed); *In re Mayes*, 45 Agric. Dec. 2320 (1986) (default order proper where answer not filed), *rev'd on other grounds*, No. 87-3066 (6th Cir. Dec. 18, 1987); *In re Pieszko*, 45 Agric. Dec. 2565 (1986) (default order proper where answer not filed); *In re Henson*, 45 Agric. Dec. 2246 (1986) (default order proper where answer admits or does not deny material allegations); *In re Guffy*, 45 Agric. Dec. 1742 (1986) (default order proper where answer, filed late, does not deny material allegations); *In re Blaser*, 45 Agric. Dec. 1727 (1986) (default order proper where answer does not deny material allegations); *In re Northwest Orient Airlines*, 45 Agric. Dec. 2190 (1986) (default order proper where timely answer not filed); *In re Schwartz*, 45 Agric. Dec. 1473 (1986) (default order proper where timely answer not filed); *In re Midas Navigation, Ltd.*, 45 Agric. Dec. 1676 (1986) (default order proper where answer, filed late, does not deny material allegations); *In re Gutman*, 45 Agric. Dec. 956 (1986) (default order proper where answer does not deny material allegations); *In re Daul*, 45 Agric. Dec. 556 (1986) (default order proper where answer, filed late, does not deny material allegations); *In re Eastern Air Lines, Inc.*, 44 Agric. Dec. 2192 (1985) (default order proper where timely answer not filed; irrelevant that respondent's main office did not promptly forward complaint to its attorneys); *In re Cuttone*, 44 Agric. Dec. 1573 (1985) (default order proper where timely answer not filed; respondent Carl D. Cuttone properly served where complaint sent by certified mail to his last business address was signed for by Joseph A. Cuttone), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); *In re Corbett Farms, Inc.*, 43 Agric. Dec. 1775 (1984) (default order proper where timely answer not filed; respondent cannot present evidence that it is unable to pay $54,000 civil penalty where it waived its right to a hearing by not filing a timely answer); *In re Jacobson*, 43 Agric. Dec. 780 (1984) (default order proper where timely answer not filed); *In re Buzun*, 43 Agric. Dec. 751 (1984) (default order proper where timely answer not filed; respondent Joseph Buzun properly served where complaint sent by certified mail to his residence was signed for by someone named Buzun); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (default order proper where timely answer not filed; irrelevant whether respondent was unable to afford an attorney), *appeal dismissed*, No. 84-

The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk.

The courts have recognized that administrative agencies "should be 'free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"[5] If respondent were permitted to contest some of the allegations of fact at this late date, or raise new issues, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel. However, there is no basis for permitting respondent to present matters by way of defense at this time.

Even if respondent were permitted to file an answer at this late date, it would not affect the outcome of this proceeding. Respondent contends that he actively tried to obtain the required bond, but was unable to do so. Continued operation, in such circumstances, without a bond, is a serious violation of the Act. *In re Johnson*, 47 Agric. Dec. ____ (Feb. 29, 1988). Furthermore, respondent could have filed a bond equivalent.

For the foregoing reasons, the following order should be issued.

Order

Respondent Mike Robertson, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

Respondent is suspended as a registrant under the Act until he complies fully with the bonding requirements under the Act and the regulations. When respondent demonstrates that he is in full compliance with such bonding

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4316 (5th Cir. July 25, 1984); *In re Lambert*, 43 Agric. Dec. 46 (1984) (default order proper where timely answer not filed); *In re Berhow*, 42 Agric. Dec. 764 (1983) (default order proper where timely answer not filed); *In re Rubel*, 42 Agric. Dec. 800 (1983) (default order proper where respondent acted without an attorney and did not understand the consequences and scope of a suspension order); *In re Pastures, Inc.*, 39 Agric. Dec. 395, 396-97 (1980) (default order proper where respondents misunderstood the nature of the order that would be issued); *In re Seal*, 39 Agric. Dec. 370, 371 (1980) (default order proper where timely answer not filed); *In re Thomaston Beef & Veal, Inc.*, 39 Agric. Dec. 171, 172 (1980) (default order not set aside because of respondents' contentions that they misunderstood the Department's procedural requirements, when there is no basis for the misunderstanding).

[5] *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954), quoting from *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

requirements, a supplemental order will be issued in this proceeding terminating this suspension.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of $500. The civil penalty shall be paid by certified check made payable to the Treasurer of the United States, and mailed to the Assistant General Counsel, Packers and Stockyards Division, Office of the General Counsel, Room 2446 South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, not later than the 90th day after service of this order on respondent.

The cease and desist provisions of this order shall become effective on the day after service of this order. The suspension provisions shall become effective on the 30th day after service of this order.

In re: PAUL RODMAN and DAVID RODMAN.
P&S Docket No. 6607.
Decision and Order filed May 27, 1988.

The Judicial Officer affirmed Judge Baker's order requiring respondents to cease and desist from various custodial account violations, including failing to deposit to their Custodial Accounts for Shippers' Proceeds, within the time prescribed, amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock, and using funds received as proceeds from the sale of consigned livestock for purposes of their own. However, the Judicial Officer increased the ALJ's suspension order from 28 days to 35 days, and affirmed that part of the order continuing the suspension until the deficits in the custodial accounts have been eliminated. The custodial account regulations from 1921 through 1982 are summarized, along with the interpretive administrative and judicial decisions. Proof of injury or likelihood of injury is not required in custodial account violation cases. *Stare decisis* applies only to the facts actually decided. The 1982 custodial account regulations have substantive effect because they were issued as legislative rules having the force and effect of law, or, alternatively, because of their long-standing acceptance. A violation is willful if a person intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements. Violations of a fiduciary duty are particularly serious violations of the Act. Severe sanction policy explained. The sanctions imposed under the P&S Act in recent years have been much more severe than during earlier years. Ignorance of the law is never an excuse or even a mitigating circumstance, under this Department's sanction policy. The statutory criteria applicable to civil penalties are not applicable to suspension orders.

Eric Paul, for complainant.
Gerard D. Eftink, Kansas City, for respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).[1] An initial

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[1]*See generally* Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law, ch. 3 (1981 and 1987 Cum. Supp.), and Carter, *Packers and Stockyards Act*, in 10 Harl, Agricultural law, ch. 71 (1980).

Decision and Order was filed on January 9, 1987, by Administrative Law Judge Dorothea A. Baker (ALJ) ordering respondents to cease and desist from various custodial account violations, including failing to deposit to their Custodial Accounts for Shippers' Proceeds, within the time prescribed, amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock, and using funds received as proceeds from the sale of consigned livestock for purposes of their own. The ALJ's order also suspends respondents as registrants under the Act for 28 days, and thereafter until they demonstrate that any deficits in their Custodial Accounts for Shippers' Proceeds have been eliminated.

On February 19, 1987, complainant, seeking a 35-day suspension order and numerous changes in the ALJ's findings and conclusions, appealed to the Judicial Officer, to whom final administrative authority has been delegated to decide the Department's cases subject to 5 U.S.C. § § 556 and 557 (7 C.F.R. § 2.35).[2] On the same day, respondents filed an appeal, contending that no suspension order should be issued because there were no violations of the Act, and certainly no willful violations, and that if a suspension order is imposed, it should be greatly reduced, particularly for respondent Paul David Rodman, the son of respondent Paul Rodman.

For the reasons set forth below, I agree with complainant's position on appeal. Except for the last finding of fact (as to the willful nature of the violations), the findings of fact set forth below are taken verbatim from the ALJ's findings, with a few changes too trivial to itemize. Numerous findings of fact by the ALJ that I regard as immaterial are not set forth herein, but the general subject matter is discussed in the conclusions.

Findings of Fact

1. Paul Rodman, doing business as Oklahoma Auction Yard, is an individual whose mailing address is P.O. Box 604, Hominy, Oklahoma 74035.

2. Respondent, Paul Rodman, is, and at all times material hereto was:

(a) Engaged in the business of conducting and operating the Oklahoma Auction Yard stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the Oklahoma stockyard;

(b) Engaged in the business of selling livestock on a commission basis at the Oklahoma stockyard, and buying and selling livestock in commerce for his own account; and

(c) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

3. (a) Paul Rodman and Paul David Rodman, hereinafter referred to as the respondents, are partners doing business as Chandler Livestock Commission Company. Respondents' principal place of business is located at

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[2]The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962-January 1971).

Chandler, Oklahoma, and their business mailing address is P.O. Box 481, Chandler, Oklahoma 74834.

(b) Respondents, at all times material herein, were:

(1) Engaged in the business of conducting and operating the Chandler Livestock Commission Company stockyard, a stockyard posted under and subject to the provisions of the Act, hereinafter referred to as the Chandler stockyard;

(2) Engaged in the business of a market agency selling livestock on a commission basis at the Chandler stockyard; and

(3) Registered with the Secretary of Agriculture as a market agency to sell livestock on a commission basis.

4. Respondent Paul Rodman has been in the cattle business for approximately 40 years and has operated, and partially owned, two auction markets, Ranchers & Farmers, Lubbock, and Clovis Cattle Company, beginning in 1961, before becoming a registered and bonded dealer under the Act in March of 1974. Under this registration, he operated as an order buyer for 2 years before moving from New Mexico to Oklahoma.

5. Respondent Paul Rodman purchased the Oklahoma Auction Yard in 1979 after having leased it in 1978. The prior owners had operated the market at that facility for many years. Respondent Paul Rodman purchased the Chandler Livestock Commission Company with his son Paul David Rodman in 1983. He considers his wife Phyllis to also share in the ownership of these markets.

6. The custodial account for the Oklahoma Auction Yard as of April 30, 1985, contained a balance of $847.93 and had outstanding custodial checks drawn on it in the amount of $53,228.81, resulting in a custodial shortage of $52,380.88 on that date. This shortage was the direct result of the deposit of all proceeds from the last sale day, April 26, 1985, into the market's general account by April 30, 1985, rather than to the custodial account. (CX 9) Each of the outstanding custodial checks as of April 30, 1985, was paid upon subsequent presentation using funds transferred from the general account on and after May 1, 1985. However, the general account on April 30, 1985, contained only $2,380.09 and had outstanding checks drawn on it in the total amount of $63,683.88, resulting in a general account shortage of $61,303.79. The funds actually transferred to pay the custodial checks issued on April 26, 1985, did not therefore come from the proceeds of such sale since these funds had already been used to pay other obligations, including a payment of $28,099.59 to Atoka Livestock Auction made purportedly for 56 head of cattle purchased by respondent Paul Rodman. (CX 10, p. 15) The actual purchase price of these 56 head was $14,992.12 and $12,585.97 of the balance was simply noted "O.A.Y." on the Atoka invoice. (CX 10, p. 14) This entry related to one of the transactions, of the Atoka market to its auctioneer, respondent Paul Rodman, that was discovered by witness Jerry Garner [a Packers & Stockyards Administration investigator], and admitted to have occurred by respondent Paul Rodman on May 28, 1985. (Tr. 43-45) Two consignors whose livestock was sold on April 26, 1985, received payments on May 6, 1985, totalling $20,445.31, at least $12,188.45 of which came from proceeds of the May 3, 1985, sale. (CX 12; Tr. 85-88)

7. On June 10, 1985, Mr. Garner returned to respondents' Chandler Livestock Commission stockyard at Chandler, Oklahoma, and made reconciliations of the custodial and general accounts as of May 3, 1985, and May 31, 1985. As a result thereof, the evidence shows that the Chandler Livestock Commission custodial account was short by $21,233.11 on May 3, 1985, and by $58,125.84 on May 31, 1985. The general account of this market was short by $22,222.51 (CX 3, p. 27; Tr. 56-64), and by $102,171.06 (CX 5, p. 26; Tr. 65-68) on these dates.

8. On May 3, 1985, respondents had issued and outstanding Chandler Livestock Commission Company custodial account checks in the amount of $22,130.66, and had, to offset the outstanding custodial checks, a bank balance in their custodial account of $.05, no deposits in transit and proceeds receivable in the amount of $897.50. (CX 2) This left the Chandler custodial account with a shortage of $21,233.11. The respondents had previously collected, on May 1 and 2, 1985, some $63,319.63 in proceeds from the April 30, 1985, sale and deposited this amount to their Chandler general account. (CX 3, pp. 1-5) Although there was a balance of $7,712.63 in this general account on May 3, 1985 (CX 3, pp. 27, 32), there were also outstanding general account checks in the amount of $29,935.14, leaving a general account shortage of $22,222.51 on May 3, 1985. (CX 3)

9. In addition to depositing all of the collected proceeds from the April 30, 1985, sale to their general account, respondents failed to pay by May 1, 1985, the day following the April 30, 1985, sale, for a purchase in the amount of $1,354.50 made by respondent Paul David Rodman. The amount of this purchase was deposited to the general account on May 6, 1985 (Tr. 57-59; CX 3, pp. 1, 6), and a general account check in the same amount was then deposited to the Chandler custodial account on May 8, 1985. (CX 3, pp. 21, 22, 23; CX 2, p. 7) Respondents dated their general account and custodial account deposit slips with the April 30, 1985, sale date in accordance with their general practice rather than with the actual deposit dates. (Tr. 59)

10. On May 31, 1985, respondents had issued and outstanding Chandler Livestock Commission Company custodial checks in the amount of $60,594.65, and had, to offset the outstanding checks, a bank balance in their custodial account of $2,468.81, no deposits in transit and no proceeds receivable. (CX 4) The resulting custodial shortage of $58,125.84 was attributable, in part, to the failure of respondents Paul Rodman and Paul David Rodman to make timely payment for $22,678.05 in market support purchases made at the Tuesday, May 28, 1985, sale. This purchase amount should have been paid to the Chandler Livestock Commission Company custodial account no later than Wednesday, May 29, 1985 (9 C.F.R. § 201.42; Tr. 65-66). In fact, respondents did not even deposit the payment to their general account until June 3, 1985.

11. Proceeds in the amount of $68,874.53 from the sale of May 28, 1985, at Chandler, were deposited to the Chandler Livestock Commission general account on May 29, 1985. (Tr. 67; CX 5, pp. 2, 29) Despite this deposit, the general account had a shortage of $102,171.06 on May 31, 1985. This book shortage figure understates the danger posed to shippers' proceeds since accounts receivable and accounts payable on the general account as of May 31, 1985, were not available at the time Mr. Garner prepared his general account analysis. (Tr. 70) However, Mr. Garner had reviewed records at two markets where respondent Paul Rodman purchased livestock, Atoka Livestock

Auction and Steeler Livestock Auction, and he was able to form a credible opinion based on his observations respecting respondent Paul Rodman's dealer operations and payment practices that accounts payable would likely exceed accounts receivable and increase the shortage figure he reached. (Tr. 68-69) Mr. Garner explained this as follows:

> Accounts payable would make the account shorter; accounts receivable would make it less short. However, Mr. Rodman's mode of operation was that he would generally buy cattle [on] a dealer basis, [at] other livestock auctions taking the next seven days to pay for those cattle. And those cattle would be taken to his livestock market very expeditiously and sold within two or three days. This would cause the short to be worse.

(Tr. 68) This general account situation precluded respondent from using the proceeds of the May 28, 1985, sale for the payment of custodial checks issued to consignors on May 28, 1985. This becomes evident upon examination of the general account balance of $9,214.36 on May 31, 1985, and the outstanding general account checks list of that date. (CX 5, pp. 26, 30, 31) There were general account checks totalling $111,385.42 outstanding. Six of these checks totalling $90,856.51 were drawn payable to the Chandler custodial account and dated May 28, 1985. They were obviously drawn to transfer proceeds from the sale of May 28, 1985, to the custodial account for the payment of consignors who received custodial checks on May 28, 1985. However, the bulk of the proceeds from the sale of May 28, 1985, was no longer available for such transfer. These six outstanding checks could not be credited to the Chandler custodial account until additional funds were deposited to the general account on which they were drawn.

12. On June 13, 1985, Mr. Garner returned to respondent Paul Rodman's Oklahoma Auction Yard at Hominy, Oklahoma, and made a second reconciliation of the custodial account as of February 28, 1985, and reconciliations of the general account as of February 28, 1985, and April 30, 1985. (Tr. 53-54; CX 6-9) The results of such reconciliations, done by Mr. Garner, establish that the Oklahoma Auction Yard custodial account was short by $42,446.69 on February 28, 1985, and that the general account in which the proceeds from the sale of February 22, 1985, had been deposited was also short by $58,214.46 on February 28, 1985. More specifically, it was shown that the custodial account had an actual balance of $288.07, and had outstanding custodial checks of $44,016.49. Respondents were credited with a proceeds receivable of $1,281.73 because they had not yet received full payment of proceeds from the sale of February 22, 1985, and were not beyond the seven calendar day period for treating this receivable as a proceeds receivable rather than an accounts receivable. However, it may be inferred from the usual practice followed by respondents that this uncollected proceeds receivable would have been subsequently deposited into the general account upon collection. (CX 6; Tr. 64 (Testimony with respect to May 3, 1985, proceeds receivable of $897.50))

13. In order that the $44,016.49 in Oklahoma Auction Yard custodial checks from the February 22, 1985, sale, still outstanding on February 28, 1985, could be honored upon presentation, respondent Paul Rodman needed to transfer at least $43,728.42 ($44,016.49 - $288.07) into the Oklahoma Auction Yard custodial account. Seven general account checks that total $43,728.60 were used for this purpose. (CX 7, p. 12; Tr. 82) Since the balance in the general account at the close of business on February 28, 1985, was only $10,003.85, at a minimum an additional $33,724.57 had to be obtained. A larger amount would have been required if all $68,218.31 in outstanding general account checks had been presented. (CX 8, p. 9) This money was supplied not from respondent Paul Rodman's own funds as would have been more appropriate, but instead from the proceeds collected for livestock sold on commission at the March 1, 1985, sale. (Tr. 80-84; CX 11) Proceeds from this sale in the amount of $57,105.61 were deposited in the general account on March 1, 1985. When asked if he had determined what had happened to the proceeds from the February 22, 1985, sale that had not been deposited to this account between February 22, 1985, and February 28, 1985, witness Garner testified:

> Only in a general sense, the fact that dealer checks paid for livestock purchases at other auctions were written from that same account. So those checks were paid during this period.

(Tr. 85)

14. In addition to leaving a $42,446.69 shortage in the Oklahoma Auction Yard custodial account as of the close of business on February 28, 1985, respondent Paul Rodman also failed to timely and properly reimburse his custodial account for February 22, 1985, purchases of market support livestock in the amount of $20,234.79. This purchase should have been paid to the custodial account no later than Monday, February 25, 1985. This was not done. Respondent Paul Rodman resold this livestock at the Atoka sale on Saturday, February 23, 1985, and received an Atoka check in the amount of $19,277.68. This check, and a check drawn by respondent Paul Rodman in the amount of $957.21 to make up a loss on resale, were deposited to the general account on February 25, 1985 (CX 7, p. 5; CX 8, p. 4; Tr. 74), and an amount equal to the sum of these two checks was then transferred to the Oklahoma Auction Yard custodial account on February 28, 1985. (CX 6, p. 4; Tr. 81) The general account check issued for this purpose, No. 15590, was dated with the sale date, February 22, 1985, and drawn payable to "OAY Custodial". (CX 7, p. 13; CX 8, p. 9) The column heading "Name of Consignor" on this and the other lists of outstanding general accounts checks was printed in error by computer and should be "Name of Payee." (CX 8, p. 9; Tr. 80) The bank credited the custodial account for $20,234.79 on February 28, 1985, and debited the general account on March 1, 1985. (Tr. 81) In effect, respondent Paul Rodman's bank provided a one-day loan or advance so that this $20,234.79 could be paid on February 28, 1985. The reason is evident. There was a general account balance of only $10,003.85 available before the deposit, on March 1, 1985, of proceeds from the March 1, 1985, sale.

15. Respondents' conduct, in depositing shippers' proceeds into their general accounts, rather than into their Custodial Accounts for Shippers' Proceeds, as required, and failing to maintain and use properly their custodial accounts, was willful, within the meaning of the Administrative Procedure Act (5 U.S.C. § 558(c)).

Conclusions

Respondents do not challenge the ALJ's findings of fact set forth above (i.e., all of the findings except Finding 15, as to willfulness). Specifically, respondents do not challenge the findings that (i) they deposited shippers' proceeds into their general accounts, rather than into their custodial accounts, (ii) they transferred money from their general accounts to their custodial accounts only when it was needed to cover checks that had been issued to shippers, (iii) there were large shortages in both their general accounts and their custodial accounts (so that if all checks outstanding in both accounts had been presented for payment on a particular date, there would not have been sufficient money in either account to pay all outstanding checks, and (iv) in some instances, checks issued to shippers on one sale date were covered by the proceeds from the following week's sale.

Respondents concede that their actions violated the applicable custodial account regulations issued under the Act, but contend, nevertheless, that there was no violation of the Act (as distinguished from the regulations) because no one was actually hurt, and there was no likelihood of injury of the type the Act was designed to prevent. Respondents also contend that there were no willful violations because respondents did not know the requirements of the regulations.

Respondents' contentions are so lacking in merit that I would be tempted to dismiss their appeal as frivolous, except for the fact that respondents' contentions are set forth with such vigor and skill by their attorney. For example, respondents' attorney relies on advice given to a bookkeeper by a Packers and Stockyards Administration Regional Supervisor more than 25 years ago, when the custodial account regulations were quite different from those in effect in 1982, and thereafter. He further relies on custodial account regulations that were eliminated by the 1982 amendments.

I will set forth first in § I the historical development of the custodial account regulations, so that the cases set forth in § II, upholding disciplinary orders based on violations of the custodial account regulations, may be fully understood.

Respondents' argument, in effect, is that even though they had shortages in their custodial accounts on the dates in question, the shortages would not have resulted in "bounced" checks unless all outstanding checks had been presented for payment on the dates in question. In essence, respondents' argument is that since the float in the custodial accounts was large enough to cover the number of checks that realistically would be presented for payment on any particular date, respondents' custodial account shortages on the dates in question were of no real concern, and should not be regarded as violative of the Act.

Respondents' argument is not only squarely contrary to case law (discussed in § II, *infra*), but is also based on a failure to understand the reasoning underlying the custodial account requirements.

The custodial account requirements are not premised on the theory that all outstanding custodial account checks will be presented for payment on a particular date. The Department is fully aware of the fact that there is a considerable delay between the time custodial account checks are written and finally presented for payment, resulting in a large float in custodial accounts. (That is why I amended the regulations effective January 1, 1968, so that market agencies could invest a portion of the custodial account funds in certificates of deposit (see § I(D), *infra*)). However, the custodial account requirements are based on the recognition that (i) market agencies are handling trust funds and, therefore, should handle them as such, and (ii) in the event of a financial failure of a market agency, or its bank, a properly maintained custodial account, with Federal Deposit Insurance Corporation protection available to each shipper, would provide adequate funds to pay all consignors. (The required bond is an additional protection to consignors if the preventive custodial account provisions fail to fully protect shippers.)

I. Custodial Account Regulations and Interpretive Decisions

A. 1921 Custodial Account Regulation.

The first custodial account regulation (§ 17(c)) was issued on November 30, 1921, just 3½ months after the enactment of the Packers and Stockyards Act. It is quoted in *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1021 (8th Cir. 1932), as follows:[3]

> No market agency shall make such use or disposition of funds in its possession or control as will endanger or impair the faithful and prompt accounting for and payment of such portion thereof as may be due the owner or consignor of livestock or other person having an interest therein, and to this end shall so handle all such funds as to prevent their being intermingled or confused with other accounts or funds of the market agency kept or used for other purposes.

Under this regulation, a market agency was not permitted to intermingle money collected from the sale of livestock with its own funds or use such money to finance its own livestock purchases.

On November 9, 1935, § 17(c) of the regulations was amended to include poultry, and it was later published without change in 3 Fed. Reg. 432, 434 (1938). It was then codified without change as § 201.21 (9 C.F.R. § 201.21 (1939)).

B. 1943 Custodial Account Regulations and Interpretative Decisions.

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[3]The court refers to the regulation as "promulgated on or about June 14, 1923" (59 F.2d at 1021), but that is the date on which revised regulations (including § 17(c)) were published in pamphlet form.

On January 12, 1943, the custodial account regulation was amended and divided into three sections, as follows (8 Fed. Reg. 393, 397 (1943)):

> **§ 201.40 Market agencies or licensees not to use shippers' proceeds or funds received for purchases on commission for own purposes through "bank float" or otherwise.** No market agency or licensee engaged in selling or buying livestock or live poultry on a commission or agency basis shall use shippers' proceeds or funds received for the purchase of livestock or live poultry on order for purposes of its own either through recourse to the so-called "float" in the bank account in which the proceeds or funds are deposited or in any other manner.
>
> **§ 201.41 Market agencies or licensees to make faithful and prompt accounting to owners, consignors or other interested persons.** No market agency or licensee shall make such use or disposition of funds in its possession or control as will endanger or impair the faithful and prompt accounting for and payment of such portion thereof as may be due the owner or consignor of livestock or of live poultry or other person having an interest therein.
>
> **§ 201.42 Shippers proceeds accounts.** If the Secretary finds that any market agency or licensee has used for purposes of its own any proceeds derived from the sale of livestock or live poultry handled on a commission or agency basis, or any funds received for the purchase of livestock or live poultry on a commission or agency basis, or any other funds which have come into its possession in its capacity of an agent, such market agency or licensee shall thereafter deposit the gross proceeds received from the sale of livestock or live poultry handled on a commission or agency basis in a separate bank account designated as "Shippers' Proceeds Account", or by a similar identifying designation. Such account shall be drawn on only for payment of the net proceeds to the person or persons entitled thereto and to obtain therefrom the sums due the market agency or licensee as compensation for its services as set out in its tariffs and for such sums as may be required to pay all legal charges against the consignments of livestock or live poultry as the market agency or licensee may, in its capacity as agent, be required to pay for and on behalf of the owner or consignor. For the proper maintenance of such accounts and in order to expedite examination thereof by duly authorized representatives of the Administration, the market agency or licensee in each case shall keep the accounts in a manner which will clearly reflect the handling of the funds in compliance with the requirements of this section.

Under this amendment, a market agency was not permitted to use shippers' proceeds for purposes of its own (§ 201.40), or to make such use of funds in its possession as would endanger or impair payment to consignors (§

201.41).[4] However, the regulation did not expressly require a market agency to maintain a separate "Shippers' Proceeds Account" unless the Secretary found that the market agency had used shippers' proceeds for purposes of its own (§ 201.42).[5]

Notwithstanding the failure of the 1943 regulations to expressly prohibit the intermingling of funds, the Department's Judicial Officer continued to hold that the intermingling of shippers' proceeds with a market agency's own funds was unlawful. For example, in *In re Houston Livestock Commission Co.*, 4 Agric. Dec. 984, 986-87 (1945), the Judicial Officer held with respect to 1944 violations:

> Failure to isolate shippers' proceeds and using such moneys for other purposes violated section 201.41 of the regulations and was an unreasonable and unfair practice in violation of sections 307 and 312 of the act. *In re Wootten Commission Company*, 4 A.D. 2. Such improper handling of shippers' funds is not only a violation of a regulation of the Department, but a violation of the fundamental concepts of honesty and fair dealing between principal and agent.

Similarly, in *In re Poland*, 5 Agric. Dec. 6, 10 (1946), the Judicial Officer held with respect to 1944 violations:

> Funds collected by a market agency for livestock sold to shippers belong to shippers. By engaging in the practice of depositing customers' remittances in his personal bank account and thereby mingling trust funds with his own, respondent was violating the obligation imposed upon him as an agent and a market agency. This action constituted an abuse of his fiduciary capacity and violated sections 307 and 312 of the act.

The same holding was made in *In re Shannon and Farrell*, 7 Agric. Dec. 951, 966-67 (1948), in which the Judicial Officer held with respect to 1946 violations (footnotes omitted):

> It is the duty of market agencies having custody of funds belonging to shippers and producers to exercise care in safeguarding these funds from dissipation or loss. Market agencies are specifically prohibited by regulation from using shippers' proceeds for purposes of their own, either through recourse to the float in the bank account in which the funds are deposited or in any other manner. Misuse of shippers' proceeds is an unreasonable and unfair practice under the act. In view

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[4] 9 C.F.R. §§ 201.40 and 201.41 remained in the regulations without change (relevant to this proceeding) until they were removed in 1982. 47 Fed. Reg. 32,693, 32,695 (1982). The notice of proposed rulemaking as to their removal stated (47 Fed. Reg. 4668, 4669 (1982)):

> It is proposed to remove §§ 201.40 and 201.41 and policy statement § 203.9. The provisions of these regulations and the policy statement are adequately covered by § 201.39 and the proposed amendments to § 201.42.

[5] On July 22, 1954, §§ 201.40, .41, and .42 were reissued without material change (19 Fed. Reg. 4523, 4528 (1954)).

of Finding of Fact 2, respondents violated the act and the regulations (1) by using shippers' proceeds to extend credit to their customers and (2) by intermingling shippers' proceeds with funds of the partnership. . . . The fact that the respondents had considerable means and ample credit at their bank, with which they had deposited a large collateral, is immaterial. "Any unauthorized use of shippers' proceeds by a market agency may damage the shippers, regardless of the wealth or position of the agency or any of its partners. Such proceeds are trust funds, and must be treated as such." *In re Bowles Livestock Commission Company*, 5 A.D. 886, 889 (1946).

C. 1963 Custodial Account Regulations.

Effective July 1, 1963 (shortly after I became Director of the Packers and Stockyards Division), the regulations were amended to expressly require all market agencies to maintain a separate Custodial Account for Shippers' Proceeds. Section 201.42 of the regulations was amended to provide (28 Fed. Reg. 3258 (1963)):

§ 201.42 Custodial accounts.

(a) Every market agency and licensee shall deposit the gross proceeds received from the sale of livestock or live poultry handled on a commission or agency basis in a separate bank account designated as "Custodial Account for Shippers' Proceeds," or by a similar identifying designation. Such account shall be drawn on only for payment of the net proceeds to the consignor or shipper, or such other person or persons who such market agency or licensee has knowledge is entitled thereto, and to obtain therefrom the sums due the market agency or licensee as compensation for its services, and for such sums as are necessary to pay all legal charges against the consignment of livestock or live poultry which the market agency or licensee may, in its capacity as agent, be required to pay for and on behalf of the consignor or shipper. The market agency or licensee shall keep such accounts and records as will at all times disclose the names of the consignors, the amount due and payable to each from funds in the Custodial Account for Shippers' Proceeds, and the handling of the funds in such account.

D. 1968 Custodial Account Regulations.

Effective January 1, 1968, I amended the custodial account regulations to permit a "net proceeds method" for making deposits in a custodial account (§ 201.42(c)), and to permit market agencies to invest a portion of their custodial account funds in a certificate of deposit (§ 201.42(h)). The amended regulations provided (32 Fed. Reg. 20,921 (1967)):

§ 201.42 Custodial accounts for trust funds.

(a) *Payments for livestock or poultry purchases are trust funds.* Each payment made by a livestock or poultry buyer to a market agency or licensee is a trust fund until such market agency's or licensee's custodial

account has been paid in full in connection with such purchase and funds deposited in custodial accounts are also trust funds. This is the case under either the net proceeds or gross proceeds method of maintaining the custodial account referred to in paragraph (c) of this section.

(b) *Market agencies and licensees required to establish and maintain custodial accounts.* Every market agency and licensee engaged in selling livestock or live poultry on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial Account for Shippers' Proceeds," or by some similar identifying designation, under terms and conditions with the bank where established, to disclose that the depositor is acting as a fiduciary with respect thereto and that the funds in the account are trust funds.

(c) *Deposits in Custodial Accounts.* Before the close of the next banking business day after consigned livestock or live poultry is sold, the market agency or licensee shall deposit in its custodial account the proceeds from the sale of consigned livestock or live poultry that are collected or received on the day of sale, and an amount equal to the proceeds receivable from the sale of consigned livestock or live poultry that are due from (1) the market agency or licensee; (2) any owner, officer, or employee of the market agency or licensee; or (3) any buyer to whom the market agency has extended credit. On or before the third day following the sale of consigned livestock or live poultry (or the next banking business day after the third day if such third day is a nonbanking business day), the market agency or licensee shall deposit in the custodial account an amount equal to all the proceeds receivable from the sale of consigned livestock or live poultry, whether or not such proceeds have been collected or received by the market agency or licensee. In lieu of the foregoing, any market agency or licensee may adopt, and thereafter continuously follow, a "net method" for making deposits in its custodial account. Under the "net method" the market agency or licensee shall, before the close of the next banking business day after livestock or live poultry is sold, deposit an amount equivalent to the proceeds of the sale of consigned livestock or live poultry less marketing charges due the market agency or licensee.

(d) *Withdrawals from custodial accounts.* The custodial account referred to in paragraph (b) of this section shall be drawn on only for payment of the net proceeds to the consignor or shipper, or such other person or persons who the market agency or licensee has knowledge is entitled thereto, to pay all legal charges against the consignment of livestock or live poultry which the market agency or licensee may, in its capacity as agent, be required to pay for and on behalf of the consignor or shipper, and when the account is not kept on a net proceeds basis, to obtain therefrom the sums due the market agency or licensee as compensation for its services.

(e) *Custodial accounts for buyers' funds. . . .*

(f) *Accounts and records.* Every market agency and licensee shall keep such accounts and records as will at all times disclose the handling of the funds in the custodial account referred to in paragraphs (b) and (e) of this section, including without limitation, such accounts and

records as will at all times disclose the names of the consignors and the amount due and payable to each from funds in the Custodial Account for Shippers' Proceeds, and the names of the principals, from whom funds have been received in the capacity of buyer for such principals, the amount of funds received from such principals, and the amount paid on behalf of such principals from funds in the Custodial Account for Buyers' Funds.

(g) *Insured banks.* The separate custodial accounts referred to in paragraphs (b) and (e) of this section shall be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(h) *Certificates of deposit.* Any market agency or licensee which has established and maintains the separate custodial account referred to in paragraph (b) of this section may invest, in certificates of deposit issued by the bank in which such account is kept, such portion of the custodial funds as will not impair the market agency's or licensee's ability to meet its obligations to its consignors. Such certificates of deposit shall be made payable to the market agency or licensee in its fiduciary capacity as trustee of the custodial funds.

Under this regulation, a market agency using the "gross proceeds method" of maintaining a custodial account (§ 201.42(c)) was required to deposit in the custodial account before the close of the next banking business day after the sale all the funds then collected plus an amount equal to the proceeds receivable from the sale of livestock to (1) the market agency; (2) any owner, officer, or employee of the market agency; or (3) any buyer to whom the market agency extended credit. In addition, by the third day following the sale of livestock, the market agency was required to deposit in the custodial account the remainder of the proceeds from the sale, whether collected or not (§ 201.42(c)).

Under the "net proceeds method" (§ 201.42(c)), the market agency had less time within which to deposit funds in the custodial account. That is, the market agency was required to deposit in the custodial account by the next banking business day after the sale an amount equal to all the proceeds from the sale, whether collected or not (which would, of course, include the proceeds receivable from the sale of livestock to the market or its owners, officers or employees). Hence under both the "net proceeds method" and the "gross proceeds method," by the next banking business day after the sale, an amount at least equal to the proceeds receivable from the sale of livestock to the market or its owners, officers, or employees had to be deposited in the custodial account.[6]

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[6]Under the "net method" in effect from 1968 to 1982, some persons erroneously thought that money collected from the proceeds of a sale could be deposited in the *general* account on the day of the sale or the next day, so long as the *total* amount of the sale was deposited in the custodial account before the *close* of the next banking business day after the sale, whether the money was collected or not (see RX A, which is a page from the P&S

(continued...)

The 1968 regulation has one anomalous provision that I included over the objection of a number of the P&S staff. It permits a market agency to invest a portion of the custodial account funds in the bank in which it maintains the custodial account, and the market agency, rather than the consignors, earns the interest on the shippers' proceeds. This provision was included because experience demonstrated that custodial accounts develop a large float due to the time lag between the issuance of a custodial account check and the ultimate cashing and clearing of the check. Since it would be impracticable to allocate a minute portion of such interest to each consignor, I permitted the market agencies to earn the interest on the invested custodial account funds, which presumably would be reflected in lower rates (Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 281 (1981)). In the event of a financial failure by the market agency, the invested funds would be available to pay shippers (perhaps with some delay), since the invested funds must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

E. 1982 Custodial Account Regulations.

Effective August 30, 1982, the regulations applicable to respondents' violations were issued (47 Fed. Reg. 32,693, 32,696 (1982)). The amendment eliminated the "net proceeds method" of making deposits to custodial accounts (see § I(D) immediately above), and increased to 7 days the period in which the balance of all proceeds, whether collected or not, had to be deposited in the custodial account. No change was made in the requirement in effect since 1968 under which market agencies were required to deposit in the custodial account by the next banking business day after the sale the proceeds then collected plus the proceeds receivable from the sale of livestock to (1) the market agency; (2) any owner, officer or employee of the market agency; and (3) any buyer to whom the market agency extended credit. The amended regulation provides (47 Fed. Reg. 32,693, 32,696 (1982)):[7]

§ 201.42 Custodial accounts for trust funds.

(a) *Payments for livestock are trust funds.* Each payment that a livestock buyer makes to a market agency selling on commission is a trust fund. Funds deposited in custodial accounts are also trust funds.

(b) *Custodial accounts for shippers' proceeds.* Every market agency engaged in selling livestock on a commission or agency basis shall establish and maintain a separate bank account designated as "Custodial

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[6](...continued)
employee manual (Tr. 29-30)). Aside from this point of confusion, the "net method" clearly required that the custodial account be fully reimbursed for all of the proceeds due from a sale by the close of the next banking business day after the sale (§ I(D), *supra*; RX A).

[7]The 1982 amendment also removed 9 C.F.R. §§ 201.40 and 201.41 because the provisions contained in those sections are adequately covered by the amended 9 C.F.R. § 201.42 (see note 4, *supra*).

Account for Shippers' Proceeds," or some similar identifying designation, to disclose that the depositor is acting as a fiduciary and that the funds in the account are trust funds.

(c) *Deposits in custodial accounts.* The market agency shall deposit in its custodial account before the close of the next business day (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) the proceeds from the sale of livestock that have been collected, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. The market agency shall thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

(d) *Withdrawals from custodial accounts.* The custodial account for shippers' proceeds shall be drawn on only for payment of (1) the next [net] proceeds to the consignor or shipper, or to any person that the market agency knows is entitled to payment, (2) to pay lawful charges against the consignment of livestock which the market agency shall, in its capacity as agent, be required to pay, and (3) to obtain any sums due the market agency as compensation for its services.

(e) *Accounts and records.* Each market agency shall keep such accounts and records as will disclose at all times the handling of funds in such custodial accounts for shippers' proceeds. Accounts and records must at all times disclose the name of the consignors and the amount due and payable to each from funds in the custodial account for shippers' proceeds.

(f) *Insured banks.* Such custodial accounts for shippers' proceeds must be established and maintained in banks whose deposits are insured by the Federal Deposit Insurance Corporation.

(g) *Certificates of deposit and/or savings accounts.* Funds in a custodial account for shippers' proceeds may be maintained in an interest-bearing savings account and/or invested in one or more certificates of deposit, to the extent that such deposit or investment does not impair the ability of the market agency to meet its obligations to its consignors. The savings account must be properly designated as a party [part] of the custodial account of the market agency in its fiduciary capacity as trustee of the custodial funds and maintained in the same bank as the custodial account. The certificates of deposit, as property of the custodial account, must be issued by the bank in which the custodial account is kept and must be made payable to the market agency in its fiduciary capacity as trustee of the custodial funds.

The notice of proposed rulemaking with respect to this amendment explains the extension of the 3-day requirement for reimbursement of uncollected funds to 7 days as follows (47 Fed. Reg. 4668, 4669 (1982)):

> The proposed extension of the present 3-day requirement for reimbursement of the custodial account for uncollected proceeds will not significantly diminish the level of protection afforded for consignors' funds and does not affect, in any way, the market agency's responsibility to account promptly to consignors. The amendment provides market agencies adequate time to collect monies due from buyers of consigned livestock and should substantially reduce the amount of money market agencies must, under the current requirements, either borrow or maintain on hand in order to reimburse the custodial account. This proposal will reduce the cost of doing business and the anticipated savings will be significant for small businesses and the industry as a whole.

II. Judicial Decisions Upholding Disciplinary Orders for Custodial Account Violations.

Administrative disciplinary orders resulting from custodial account violations have been challenged on appeal in eight prior cases. Each case has affirmed the disciplinary order at issue in the case. The judicial cases involving custodial accounts are set forth in this section in chronological order.

A. Donahue Bros. (8th Cir. 1932).

In *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932), the court upheld a $3,000 civil penalty (which is equivalent to about $25,750 today)[8] for custodial account violations occurring during the period when the 1921 custodial account regulation was in effect (see § I(A)). Prior to the violations involved in *Donahue*, the Secretary had issued a cease and desist order on November 21, 1924, directing the defendants to cease and desist from violating the Packers and Stockyards Act (59 F.2d at 1020)--

> (1) by disposing of funds in its possession or control so as to endanger the prompt accounting for payment of the proceeds due owners of live stock, and intermingling its personal accounts with those belonging to shippers and consignors of live stock consigned to it in its capacity as a market agency; [and] (2) by crediting the net proceeds of the sale of live stock to its estray account or other personal account, instead of remitting such proceeds promptly to the shippers. . . .

The violations involved in *Donahue* were "that the defendant violated this order by converting the proceeds of sales of such stock to its own use, thereby endangering the payment of proceeds due the owners of live stock and by

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[8]The B L.S. Consumer Price Index, which used 1967 as the base year (100), shows 1932 as 40.9 and February 1986 as 327.5. 327.5 ÷ 40 9 = 8.0073 x $3,000 = $24,022. The revised B L.S. Consumer Price Index, which uses 1982-1984 as 100, shows 1986 as 109.6 and April of 1988 as 117.2, a difference of 7.6 points.

intermingling its personal accounts with those belonging to shippers and consignors" (59 F.2d at 1021).

The court held that the validity of the cease and desist order at issue depended upon whether the practices covered by the order violated the Act, stating (59 F.2d at 1021-22):

> This action, however, is for a violation of the cease and desist order entered upon hearing after proper notice to the defendant, and is not dependent for its validity upon the regulation referred to. The regulation promulgated by the Secretary condemned the practice later covered by the cease and desist order as unfair and unjust within the meaning of the act. Of course, if these practices are not violative of the provisions of the act, then the Secretary had no authority to enter the cease and desist order; but we are of the view that the regulation promulgated June 14, 1923, was in the nature of an administrative measure designed to advise those subject to the act in advance what practices the Secretary considered to be in violation of the act. It gave notice to the defendant that, as the Secretary construed the act, these practices were forbidden. There was no attempt to legislate by this regulation, but simply to give notice of the Secretary's construction of the act, so that the cease and desist order depends for its validity upon the statutes and not upon the regulation.

In determining that the intermingling of shippers' funds with the market agency's funds was an unfair practice in violation of the Act, the court referred to the broad and comprehensive nature of the Packers and Stockyards Act, as follows (59 F.2d at 1022):

> It is contended by defendant that the practices condemned by the Secretary in his cease and desist order were not subject to his regulation under the act, and that Congress had not disclosed any purpose to legislate in the field of accounting between the commission men and their customers, beyond the matter of requiring full and true disclosure to be made by bookkeeping and furnishing of indemnity in the nature of bonds; that the matter of handling money and safeguarding it had been left by Congress to local law. The act is a very broad and comprehensive law. If we may look to the report of the congressional committee in aid of its interpretation, as was done in Tagg Bros. & Moorhead v. United States, supra, it would seem clear that those in charge of the legislation were impressed with its comprehensiveness. In the report of the House Committee on Agriculture, it is stated that this law, "and existing laws, giving the Secretary of Agriculture complete inquisitorial, visitorial, supervisory, and regulatory power over the packers, stockyards, and all activities connected therewith; that it is a most comprehensive measure and extends further than any previous law in the regulation of private business, in time of peace, except possibly the interstate commerce act."
>
> Further it is stated in this report: "It is not the thought of the committee that the act will in any way interfere with the existing livestock exchanges and similar bodies now organized in the yards, *in*

so far as their rules, regulations, or practices are not found by the Secretary to be unfair or unreasonable. [Italics supplied [by the court].]"

Mr. Haugen, who was Chairman of the House Committee on Agriculture, speaking for his committee with reference to this bill, said:

"The Secretary is to have exclusive jurisdiction over all transactions connected with the slaughtering and marketing of livestock and livestock products in interstate commerce, subject, of course, to court review; to gather and compel information concerning and to investigate the organization, conduct, practices, and management of the packers and stockyards, *including all transactions in or about the stockyards by all concerns or persons dealing on such yards.* * * *

"In the case of the stockyards the evils to be dealt with are a multiplicity of more or less minor matters, such as proper rates and charges for the care of cattle at the stockyard and for feed furnished to them, *and minor injustices against shippers and purchasers*, which, if to be remedied effectively, must be dealt with promptly. [Italics supplied [by the court].]"

In sustaining the Secretary's view that the commingling of shippers' funds with the market agency's personal funds was an unfair practice, the court further stated (59 F.2d at 1022-23):

The defendant as a market agency stood as a fiduciary in relation to the proceeds of sales of live stock handled by it for the benefit of its customers, and the law has always looked with disfavor upon the practice of one who in such a position used such property as his own, or commingled it with his own. Union Stock-Yards Nat. Bank v. Gillespie, 137 U.S. 411, 11 S. Ct. 118, 34 L.Ed. 724; Farmers' & Mechanics' Natl. Bank v. Sprague, 52 N.Y. 605. To do so without authority from his cestui que trust would not be countenanced by a court of equity and would be condemned generally as bad business practice. The act specifically forbids unfair, unjust, unreasonable, or deceptive practices or devices by market agencies in connection with the marketing of live stock or the performance of stockyard services. The Secretary is granted authority to enforce just and reasonable practices and to prevent those unjust and unreasonable. True, the act does not specify forbidden practices in detail, but the constitutionality of the act is not assailed, and we think could not be successfully assailed on the ground that the forbidden practices are too uncertainly stated. . . .

. . . .

. . . The practices indulged in by the defendant stand admitted, and the Secretary found that these practices were unfair. This determination by the Secretary is entitled to great weight. The proper handling of shippers' funds and their proper transmission to the shipper is a part of defendant's duty in performing stockyard services. . . .

> We are of the view that the practices condemned as unfair by the Secretary and forbidden by his cease and desist order, constitute unfair practices within the scope of the Packers and Stockyards Act, and that the Secretary had authority to enter this order.

The court disposed of the argument that the required bond was the only protection contemplated by Congress as follows (59 F.2d at 1023):

> But it is urged that, inasmuch as the act requires the market agency to furnish a bond for the protection of the shipper, this indicates an intent to adopt this as an exclusive remedy. There can be no assurance that the bond required (in this case a $30,000 bond) will fully protect shippers' interests; neither is the requirement for furnishing such a bond inconsistent with the action of the Secretary in demanding that the defendant cease and desist from the practices condemned. If, notwithstanding the demands of the Secretary, the commission men persist in the practice, and by reason of such practice the shippers suffer pecuniary loss, they could then recover on the bond. The prohibition against unfair practices is to protect shippers. The bond requirement is to give shippers a remedy when protection fails.

B. Daniels (7th Cir. 1957).

In *Daniels v. United States*, 242 F.2d 39, 40-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957), which involved the 1943 custodial account regulations (see § I(B)), the court sustained the 4-month suspension of a market agency's registration because of custodial account violations (its third offense) and improper feed and shed pen charges. In *Daniels*, the market agency drew drafts on his shippers' proceeds account payable to consignors, endorsed the drafts with the names of the payees (without their authorization), deposited the drafts to his personal account, and simultaneously paid the consignors by checks drawn on his personal account.

In rejecting the arguments that the violations were trivial and that no shipper was hurt, the court stated (242 F.2d at 41-42):

> Respondent refers to such violations as trivial irregularities. Respondent also emphasizes that none of his customers lost any money because he remitted by check instead of using drafts on his shippers' proceeds bank account. Respondent explains that the procedure was followed in many instances in order to correct errors that were found in the drafts as drawn.
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> . . . .
>
> . . . Respondent insists that the decision of the Judicial Officer herein will put him out of business permanently.

The improper handling and use of the shippers' proceeds is plainly contrary to the Act, 7 U.S.C.A. § § 205, 208 and 213(a), and of the regulations (9 CFR § 201.40-201.42.) The argument that there is no evidence of any particular shipper not being paid, is not controlling. It

is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. Federal Trade Commission v. Raladam Co., 316 U.S. 149, 152, 62 S.Ct. 966, 86 L.Ed. 1336; Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 466, 668, 61 S.Ct. 703, 85 L.Ed. 949.

C. Hyatt and Ward (10th Cir. 1960).

In *Hyatt and Ward v. United States*, 276 F.2d 308, 310-13 (10th Cir. 1960), involving the 1943 custodial account regulations (see § I(B)), the court sustained the 20-day suspension of a market agency's registration because of custodial account violations (its second offense) and other miscellaneous violations. In *Hyatt and Ward*, the market agency contended with respect to another violation that a "practice or transaction that 'hurts no one' . . . should not be made the basis of disciplinary action" (276 F.2d at 312). But the court rejected that argument (*id.*).

With respect to the custodial account violations, the court upheld the Judicial Officer's order notwithstanding the fact that the market agency always promptly reimbursed the custodial account, stating (276 F.2d at 313) (footnote omitted):

> The petitioners had been ordered to establish and maintain the custodial account by reason of prior difficulties, pursuant to 9 CFR § 201.42. Petitioners used the custodial account to finance personal business, not in an isolated transaction, but in a series of deals the true nature of which was not revealed by their records. It is true that after withdrawals from the custodial account, found to have been made for purposes not contemplated by the regulations, prompt reimbursement of the account unfailingly was made by company checks. This, however, did not regularize the initial withdrawals and we do not think that the Judicial Officer was wrong in his conclusion that they were in violation of the regulations under the circumstances.

D. Bowman (5th Cir. 1966).

In *Bowman v. USDA*, 363 F.2d 81, 84-86 (5th Cir. 1966), the court sustained the 30-day suspension of a market agency's registration because of custodial account violations (third offense). (Although other violations were involved in the case, "the custodial account departures are the most serious," and "[t]hese departures were the basis for the [30-day] suspension under § 204" (363 F.2d at 85)).

With respect to other violations in the case, the court held that proof of a particular injury is not required, stating (363 F.2d at 85):

> And the Act is designed to "* * * prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required." Daniels v. United States, 7 Cir., 1957, 242 F.2d 39, 42.

In sustaining the suspension order based on the custodial account violations, notwithstanding the fact that "no one suffered a loss," the court stated (363 F.2d at 85-86):

With respect to the other business practices which were held to violate the Act, the custodial account departures are the most serious. These departures were the basis for the sixty days [should be 30] suspension under § 204. We begin with the proposition that the custodial account was to contain funds which Mr. Bowman received from the sale of livestock which had been consigned to the stockyards for sale on a commission basis. Three such accounts were maintained. These were fiduciary accounts. United States v. Donahue Bros., Inc., supra. The administrative regulations, 9 CFR 201.40, 201.42(a), which are neither vague in terms or lacking in a statutory base, §§ 213(a), 221, provide:

. . . .

He was ordered then to maintain custodial accounts separate from his own accounts. The evidence is abundant that he has not done so. He used custodial account funds in financing the purchase of cattle by Luther Brackeen, and also in purchasing cattle for himself. He also used custodial account funds to extend credit to persons who purchased livestock from him. His answer is that his own funds were in these custodial accounts and that no one suffered a loss. But these were trust funds. United States v. Donahue Bros., Inc., supra. They were to be kept separate from his own, and it was a part of his duty in performing stockyard services to properly handle and use shipper proceeds. Daniels v. United States, supra. Moreover, he had stipulated that he would not so use the custodial account funds, and he was also under an order not to do so. 15 Agr.Dec. 828, supra. The findings and conclusions of the Judicial Officer concerning the custodial accounts and Mr. Bowman's conduct with respect thereto, and the order based thereon are fully warranted in fact and in law, and are entitled to stand.

E. Miller (5th Cir. 1974).

In *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974), involving the 1968 custodial account regulations (see § 1(D)), the court sustained a 21-day suspension order issued because of custodial account (second offense) and other violations. The Judicial Officer adopted the ALJ's decision rejecting respondent's argument that no one was hurt by the custodial account violations, stating (*In re Miller*, 33 Agric. Dec. 53, 62-63, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974)):

Respondent further argues that no one apparently suffered monetary damages as a result of Respondent's actions. It is noted that this same argument was advanced in the *Bowman* and *Daniels* cases *supra*, but to no avail.

. . . .

The principal issues raised by the respondent on appeal relate to the 21-day suspension order entered by the Administrative Law Judge. Considering the respondent's serious violations occurring over an

extensive period of time, the 21-day suspension order is entirely appropriate.

In selling livestock for farmers and other persons on a commission basis, the respondent was acting in a fiduciary capacity. He was required to exercise the highest degree of care to protect the interests of the consignors. The custodial account regulations were promulgated to insure that shippers' proceeds are properly handled as trust funds.

In sustaining the 21-day suspension order, the court stated (498 F.2d at 1089):

7 U.S.C. § 204 provides that, upon a finding of a violation, the Secretary may issue a suspension of a registrant for a reasonable specified time. The scope of review of this statute was set out in Butz v. Glover, 411 U.S. 182, 188-189, 93 S.Ct. 1455, 1459, 36 L.Ed.2d 142, 148 (1972): "[t]he fashioning of an appropriate and reasonable remedy is for the Secretary, not the court. The court may decide only whether under the pertinent statute and relevant facts, the Secretary made 'an allowable judgment in [his] choice of the remedy.'"

F. Arab Stock Yard (5th Cir. 1978).

In *Arab Stock Yard, Inc. v. USDA*, 582 F.2d 39 (5th Cir. 1978), the court affirmed without opinion a 14-day suspension order based on custodial account violations (after prior warning). (Although there were other violations involved in the case, the Judicial Officer stated that "respondent's custodial account violations would, by themselves, warrant suspension of respondent's registration for at least 14 days" (*In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978)). The custodial account violations were based on the 1968 regulations (see § I(D)), and resulted because of the market agency's "failure to deposit in the custodial account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from sales of consigned livestock," and because the market agency financed a dealer out of the custodial account by permitting him to delay making payment for livestock purchases (37 Agric. Dec. at 297).

Although there was no evidence that anyone suffered any monetary loss as a result of the custodial account violations, and "respondent had an arrangement with its bank whereby the bank honored overdrafts" (37 Agric. Dec. at 301-02), the Judicial Officer held that the violations were serious, stating (37 Agric. Dec. at 310-11 n.11):

Respondent's failure to handle the shippers' trust funds properly is a serious violation notwithstanding respondent's line of credit with its bank. A line of credit with a bank does not afford adequate protection to shippers because it can be immediately cancelled by the bank when would be most needed and, also, in the case of the bank's failure, the shippers would lose the benefit of Federal Deposit Insurance corporation protection which they would have had if their trust funds were properly handled. See, *e.g.*, *In re Sechrist Sales Company*, 36 Agr Dec 665, 673-675 (1977); *In re Harry C. Hardy*, 33 Agr Dec 1383, 1401-1403 (1974); *In re Bowman and Reynolds*, 23 Agr Dec 1065,

1068-1071 (1964); *In re Shannon and Farrell*, 7 Agr Dec 951, 967 (1948); *In re Bowles Livestock Commission Company*, 5 Agr Dec 886, 889 (1946).

G. Roseth (8th Cir. 1980).

In *Roseth v. Bergland*, 636 F.2d 1224 (8th Cir. 1980), the court affirmed without published opinion a 14-day suspension order issued because of custodial account violations (after prior warning).

The violations, which involved the 1968 regulations (see § I(D)), occurred because respondent, who used the "net method," "failed to deposit in said account, within the time prescribed by the regulations, an amount equal to the proceeds receivable from the sale of consigned livestock" (*In re Roseth*, 39 Agric. Dec. 28, 33, *aff'd*, 636 F.2d 1224 (8th Cir. 1980) (unpublished)).

Respondent argued that his bookkeeper was not aware of the regulatory requirements. The ALJ's finding of fact, in this respect, adopted by the Judicial Officer, states (39 Agric. Dec. at 33-34):

> 9. The respondents' witness, Mrs. Roseth, who has been respondents' bookkeeper since 1975, and who was a housewife, and who has not had any bookkeeper training testified she was unfamiliar with the regulatory requirements and what was required by the "net method".

The Judicial Officer also adopted the ALJ's findings that respondent had a line of credit with its bank, and that no one was hurt by the custodial account violations, *viz.* (39 Agric. Dec. at 34):

> 11. The respondents have a line of credit and an informal understanding with the First National Bank in Philip, South Dakota, to honor overdrafts and the bank has so honored overdrafts.
>
> 12. The evidence discloses that none of the respondents' checks has been returned for insufficient funds and that all of respondents' consignors have been paid in full.

In addition, the Judicial Officer adopted the ALJ's finding as to the "catastrophic and devastating effects" of a suspension order, *viz.* (39 Agric. Dec. at 34):

> 14. Mr. Waara, Vice President of the First National Bank of Philip; Mr. Ekstrum, President of the First National Bank of Philip; Mr. Kennedy, a business and cattleman; Mr. Seagers, an insurance salesman; and Mr. West, the mayor of Philip, a community of approximately 1000 people, all testified to the beneficial effects on the community of Respondents' business and to the catastrophic and devastating effects which a suspension would have.

The ALJ's conclusions sustaining the violation of the custodial account regulations, adopted by the Judicial Officer, state (39 Agric. Dec. at 34-35):

Respondents argue that the 72 hour deposit requirement is arbitrary and impossible to comply with and that the Packers and Stockyards Act does not require that a market agency must have unlimited funds to meet the deposit requirement of an amount equal to the proceeds receivable, regardless of whether such proceeds have been collected or not and that the Act does not require a market agency to act as an unconditional insurer of prompt payment on the part of the buyers.

In essence, respondents challenge the validity of Regulation 201.42 on the basis that said regulation is beyond the scope of authority of the Secretary of Agriculture. That challenge must fail herein. The evidence does not show, nor do I find any legal basis, to declare the regulation invalid and beyond the scope of the Secretary of Agriculture to promulgate.

Respondents further argue that the deficiencies in their Custodial Account for Shippers' Proceeds did not constitute unfair and deceptive practices. They argue that they did not get paid promptly by purchasers from them. This argument also is not correct. In addition to endangering the consignors' proceeds, the failure to properly maintain their Custodial Account for Shippers' Proceeds allowed the respondents an unfair advantage over those who do comply with the Regulations.

In additional conclusions by the Judicial Officer, he stated that respondent's custodial account violations violated the Act and regulations, as follows (39 Agric. Dec. at 36):

Respondents argue that their custodial account violations are not unfair, unjustly discriminatory or deceptive practices which are prohibited by the Act, and that the custodial account regulation (9 CFR 201.42), as applied to their activities, is outside the scope of the enabling Act. However, respondents extended credit to themselves and to their customers in substantial amounts for extended periods of time in violation of the regulation. It is well settled that such activities are in violation of the regulation. It is well settled that such activities are in violation of the Act. See *Bowman v. United States Department of Agriculture*, 363 F.2d 81, 85-86 (C.A. 5); *Daniels v. United States*, 242 F.2d 39, 41-42 (C.A. 7), certiorari denied, 354 U.S. 939; *United States v. Donahue Bros.*, 59 F.2d 1019 (C.A. 8); *In re Farmville Livestock Market*, 38 Agr Dec 973, 981-982, 984 (1979); *In re Schuyler County Sales Co.*, 37 Agr Dec [140,] 152-154 (1977); *In re Smithfield Livestock Market, Inc.*, 36 Agr Dec 1546, 1557-1562 (1977); *In re Sechrist Sales Company*, 36 Agr Dec 665, 666-667, 671-675 (1977); *In re Harry C. Hardy*, 33 Agr Dec 1383, 1398-1406 (1974); *In re James J. Miller*, 33 Agr Dec 53, 59-62 (1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agr Dec 596, 605-608 (1968); *In re Bowman and Reynolds*, 23 Agr Dec 1065, 1068-1071 (1964); *In re Shannon and Farrell*, 7 Agr Dec 951, 967 (1948).

H. Blackfoot Livestock (9th Cir. 1987).

In *Blackfoot Livestock Commission Co. v. Department of Agriculture*, 810 F.2d 916, 921 (9th Cir. 1987), the court affirmed a 6-month suspension order issued for various violations, including violations of the 1982 custodial account regulations (see § I(E)).

In *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987), the Judicial Officer adopted the ALJ's findings and conclusions, in which the custodial account violations are described as follows (45 Agric. Dec. at 601-04):

> On December 31 1981, there were outstanding checks drawn on the custodial account in the amount of $102,044.95. (CX 10, p. 24, 27-28; TR 64) The bank statement showed a balance of $83,457.07. (CX 10, p. 24, 26; TR 63) There were no other debits to offset the outstanding checks. (CX 10, p. 24; TR 63) Comparing the bank balance with the outstanding checks reveals a shortage of $18,587.88 in funds available to pay shippers their proceeds on December 31 1981.
>
> Respondent did not dispute the accuracy of complainant's figures, but was, apparently, content to point out that a few of the outstanding checks were issued to respondent or to businesses run by its owners (TR 131), and that no custodial account checks were ever returned for insufficient funds. (TR 134)
>
> This is not a meritorious defense for, as the Judicial Officer specifically noted in *In re Bowman and Reynolds*, 23 Agric. Dec. 1065 at 1071, quoting *Harry C. Daniels, d/b/a Harry C. Daniels and Co. v. United States*, 242 F2d 39, 41-42 (7th Cir. 1957), *cert. denied*, 345 U.S. 939 (1957):
>
> > "The argument that there is no evidence of any particular shipper not being paid is not controlling. It is the duty of a regulatory agency to prevent potential injury by stopping unlawful practices in their incipiency. Proof of a particular injury is not required. *Federal Trade Commission v. Raladam Co.*, 316 U.S. 149, 152, 62 S. Ct. 966, 86 L. Ed. 1336; *Fashion Originators Guild of America v. Federal Trade Commission*, 312 U.S. 457, 466, 668, 61 S. Ct. 703, 85 L. Ed. 949."
>
> . . . .
>
> The evidence in the record of this proceeding clearly shows that respondent did not maintain its custodial account in accordance with the requirements of section 201.42 of the regulations.
>
> Ms. Bergers' analyses show convincingly that the respondent permitted substantial shortages to develop in the amount of custodial account funds available to pay the outstanding custodial account checks issued to the consignors of livestock. (CX 8, 10-12)

Blackfoot Livestock, or its owners, made substantial purchases of consigned cattle on several occasions ranging well over $100,000.00. (CX 14 and 15)

Under section 201.42(c) of the regulations (9 CFR § 201.42(c)), Blackfoot is required to reimburse the custodial account for its purchases or for the purchases of its owners or officers, Dennis Lake and Delwyn Ellis, by the close of business on the next business day following the sale (Monday). (TR 164)

Regularly and habitually, respondent failed to timely reimburse the custodial account for these purchases. (CX 14 and 15)

Respondent also violated the Act by depositing some of the sale proceeds in its general account - not the custodial account. For example, on each Monday during the period examined, amounts of trust funds from a low of $32,469.12 on Monday, December 21 1981, to a high of $284,899.84 on Monday, March 9 1981, were deposited not to the custodial account as required but into respondent's general account. (CX 14, 15; TR 155)

As trust funds, the proceeds from the sale of livestock sold on a commission basis may be used only to pay consignors the net proceeds from the sale of their livestock, after deducting the market's lawful charges. Properly maintaining such funds in a custodial account prevents them from being commingled with the firm's general operating funds and thereby endangered.

Mr. Griffin Bonham, Branch Chief, Marketing Practices Branch, Packers and Stockyards Administration, testified concerning his personal experience with situations where banks offset funds in a market's general account to cover the market's indebtedness to the bank, but had been prevented from attaching custodial funds since those funds belonged to the consignors, not the market. (TR 537-38) *See also, Union Stock Yards Bank v Gillespie*, 137 US 411 (1890); *Steers v. Stockyards National Bank*, 113 Tex 387, 256 S.W. 586 (1923).

Additionally, each consignor who has money in the custodial account is entitled to FDIC coverage up to $100,000.00 rather than the account itself being subject to a single FDIC coverage of $100,000.00. (TR 156)

Consignors are entitled to rely on the market's compliance with the regulations promulgated under the Packers and Stockyards Act (9 CFR §§ 201.40, 201.42) to ensure that their funds are being properly safeguarded in a custodial account. Rather than safeguarding these funds in a custodial account, however, Blackfoot diverted a significant portion of these funds each week to its general account where it was used for Blackfoot's own purposes.

. . . .

While Blackfoot was depositing trust funds into its general operating account, even that was insufficient to prevent the general account from being overdrawn.

It was standard operating procedure for Blackfoot to divert custodial funds into its general account in order to enable it to more easily make payments on its operating loan.

In effect, Blackfoot was borrowing money from its consignors (without their permission) to help Blackfoot pay back the bank. In many cases, the custodial account was not reimbursed until the Wednesday or Thursday following a Friday sale. Blackfoot used its consignors' money for its own purposes and has endangered consignors' proceeds.

The Secretary has consistently held, and the courts have sustained, that the failure of a market agency to maintain its custodial account in accordance with the requirements of section 201.42 is a violation of sections 307 and 312(a) of the Act (7 USC § § 208, 213(a)), as well as a violation of section 201.42 of the regulations. (9 CFR § 201.42) *In re Arab Stock Yard*, 37 Agric. Dec. 293, 301-02, 310-11 [*aff'd mem.*, 582 F.2d 39 (5th Cir. 1978)]; *In re Breckenridge Auction & Sales Co.*, 36 Agric. Dec. 1522 (1977); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 666, 671-75 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 60-62 (1974), *aff'd sub. nom., Miller v Butz*, 498 F2d 1088 (5th Cir. 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 Agric. Dec. 596, 605-10 (1968); *In re Anderson*, 26 Agric. Dec. 615, 619-20 (1967); *In re Koenig*, 24 Agric. Dec. 1213, 1219-20 (1965); *In re Bowman*, 23 Agric. Dec. 1074, 1086-89 (1964), *aff'd, Bowman v United States Department of Agriculture*, 36[3] F.2d 81 (5th Cir. 1966); *In re Bowman and Reynolds*, 23 Agric. Dec. 1065, 1068-71 (1964); *In re Daniels*, 14 Agric. Dec. 903, 913-17 (1955), *aff'd, Daniels v United States*, 242 F2d 39 (7th Cir. 1957), *cert. denied*, 345 U.S. 939 (1957).

Further, the Secretary has repeatedly determined that a market agency's failure to make deposits to its custodial account in the manner and within the times prescribed in section 201.42 is an unfair and deceptive practice. "It is deceptive because shippers do not know that their money is being used to extend credit to buyers. It is unfair because it is using trust money for their own purposes (to extend credit to themselves and others.)" *In re Hardy*, 33 Agric. Dec. at 1400.

In affirming the Judicial Officer's decision and order, the court in *Blackfoot* held (810 F.2d at 921):

B. Custodial Account

Blackfoot, as a registered auction, must maintain a separate custodial account for consignor's funds. 9 C.F.R. § [2]01.42 (1982). Blackfoot acts as a fiduciary and may not mingle these accounts with other operating funds. *Id. See also Bosma*, 754 F.2d at 809 (registered auctions must operate as fiduciaries for livestock sellers).

The departmental investigators reconciled Blackfoot's custodial account at the close of four separate months. Each time there was a

deficiency of varying amounts. Both the ALJ and the JO found Blackfoot's explanation for the discrepancies not credible. Substantial evidence supports the JO's conclusion that Blackfoot had improperly maintained its custodial account.

III. Proof of Injury or Likelihood of Injury Is Not Required in Custodial Account Violation Cases.

Respondent argues that since there was no injury or likelihood of injury from respondents' custodial account activities, their actions cannot be found to have violated the Packers and Stockyards Act. However, as shown in § II, *supra*, the cases have consistently sustained sanctions issued in custodial account violation cases notwithstanding the fact that specific injury or likelihood of injury was never shown in any of the cases, i.e., it was merely recognized that whenever trust funds are not properly handled as such, a custodial account shortage endangers consignors.

The Department has consistently taken the position that in order to prove that a practice is "unfair" under §§ 202(a) (7 U.S.C. § 192(a)) or 312(a) (7 U.S.C. § 213(a)) of the Act, it is not necessary to prove predatory intent, competitive injury, or likelihood of injury; and that it is the Department's duty to stop unlawful practices in their incipiency prior to actual injury.[9]

A contrary view has been expressed in only a few, atypical cases (three from the Ninth Circuit). In *Armour & Co. v. United States*, 402 F.2d 712, 717-23 (7th Cir. 1968), involving coupon rebates to ultimate consumers on bacon packages, the Seventh Circuit held that the evidence must show either predatory intent or that the coupon practice was likely to result in injury to competition to be in violation of § 202(a).

In *Central Coast Meats, Inc. v. USDA*, 541 F.2d 1325, 1327 (9th Cir. 1976) (2-1 decision), in which the Department contended that a packer engaged in an "unfair" practice by being a packer and a dealer, the Ninth Circuit questioned the Secretary's argument that "actual injury need not be shown and that § 202(a) may be used to uproot unfair practices in their incipiency." The court held that "the Secretary must show that the conduct in question [packer-dealing] is likely to produce the sort of injury the Act is designed to prevent" (*id.*).

In *Corona Livestock Auction, Inc. v. USDA*, 607 F.2d 811, 814 (9th Cir. 1979), in which the Department contended that a unique method of conducting a livestock sale was "unfair" because livestock buyers present at the sale were not permitted to bid on livestock, but could only accept or reject a

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[9] *E.g., In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final order*, 44 Agric. Dec. 1971 (1985) (consent cease and desist order and $10,000 civil penalty); *In re Walt, Hilling & Co.*, 39 Agric. Dec. 119, 149-50 (1978); *In re Hines*, 35 Agric. Dec. 113, 123-24 (1976); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 161-76 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and *see Swift & Co. v. United States*, 393 F.2d 247, 253 (7th Cir. 1968); *Bowman v. USDA*, 363 F.2d 81, 85 (5th Cir. 1966); *Wilson & Co. v. Benson*, 286 F.2d 891, 895 (7th Cir. 1961); *Hyatt v. United States*, 276 F.2d 308, 312 (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *cf. FTC v. Texaco, Inc.*, 393 U.S. 223, 225-26 (1968); *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 394-95 (1953); and *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726, 738 (1945) (the last three cases involve incipiency doctrine under FTC Act).

predetermined price set by the salesman, who rotated the opportunity to accept or reject the price among the potential buyers, the Ninth Circuit repeated that the *Central Coast* case requires the agency to establish that a particular practice is "likely to produce the sort of injury the Act is designed to prevent."

In *DeJong Packing Co. v. USDA*, 618 F.2d 1329, 1336-37 (9th Cir.) (2-1 decision), *cert. denied*, 449 U.S. 1061 (1980), in affirming the Department's position that a group boycott of a livestock auction market by meat packers was an "unfair" practice, the Ninth Circuit held that the agency must show a "reasonable likelihood" of an undue restraint of competition.[10]

The Department does not agree with the decisions in the *Central Coast, Corona*, and *Armour* cases,[11] and adheres to its consistent policy set forth above.

In *Bosma v. USDA*, 754 F.2d 804, 808 (9th Cir. 1984), the court quoted its *Central Coast Meats, Inc.* holding that the Department must show that the challenged conduct "is likely to produce the sort of injury the Act is designed to prevent." The court found that actual harm resulted when an auction operator purchased livestock from consignments for speculation. *Id.* 808-09.

However, what is important for the present case is that in *Bosma*, the court also held that the failure of the auction operator to inform consignors that he was the actual purchaser of their livestock was "inherently unfair" because "the market agent had a fiduciary duty to his consignors," and that such failure "may be considered an 'unfair' or 'deceptive' practice absent a more specific showing of actual harm" (754 F.2d at 809).

Finally, in *Farrow v. USDA*, 760 F.2d 211, 215 (8th Cir. 1985), involving an agreement by two competitors not to compete for certain cows at an auction market, the court held that "actual injury" need not be proven because the "purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered." The court said that "the Secretary need only establish the likelihood that an arrangement will result in competitive injury to establish a violation" (*id.* at 215).

If the cases requiring proof of a likelihood of competitive injury are to be followed (which we believe is unsound), they should only be followed in the same types of cases in which the holdings were made. Holdings in all cases

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[10]In *Swift & Co. v. United States*, 317 F.2d 53, 56 (7th Cir. 1963), the Judicial Officer had held that proof of injury to competition, as required by § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, was unnecessary to establish a violation of § 202(a) of the Packers and Stockyards Act. The court, however, did not decide whether that conclusion is correct "since it found that the point is academic" (*id.*).

[11]*See In re ITT Continental Baking Co.*, 44 Agric. Dec. 748, 781-82 (1985), *final order*, 44 Agric. Dec. 1971 (1985) (consent cease and desist order and $10,000 civil penalty); *Western Iowa Farms Co. v. Sioux City Stock Yards*, 38 Agric. Dec. 1296, 1322 n.12 (1979), *aff'd*, 629 F.2d 502 (8th Cir. 1980) (2-1 decision); *In re Sterling Colo. Beef Co.*, 35 Agric. Dec. 1599, 1602 (1976) (ruling on certified questions), *final decision*, 39 Agric. Dec. 184 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 171-77 (1974), *rev'd*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision).

should be confined and limited to the facts under consideration when the expressions relied upon were made, and should not be extended to cases where the facts are essentially different. "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821). That principle was applied in *Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935), with respect to the decision in *Myers v. United States*, 272 U.S. 52 (1926), in which it is said that the numerous expressions in the *Myers* case beyond the "narrow point actually decided" do not come within the rule of *stare decisis* (295 U.S. at 626). Again the principle was followed in *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98, 102-04 (1937), with respect to the prior decision in *Taylor v. United States*, 207 U.S. 120, 124-25 (1907).

Many types of practices have been held to be "unfair" under the Packers and Stockyards Act without any proof of predatory intent or likelihood of injury. For example, it is an "unfair" practice for a livestock market agency to engage in business without a bond irrespective of any likelihood of injury. *E.g., In re Hoth*, 36 Agric. Dec. 1812, 1817-19 (1977). In *Hoth*, the livestock market agency contended that there was no need for him to have a bond since he bought livestock only for a large packing agency, which was bonded, and he operated only with the packer's funds and paid for all livestock with checks drawn on the packer. There was no real "likelihood" of injury there, but the market agency's practice of operating without his own bond was, nonetheless, held to be an "unfair" practice.

If proof of a likelihood of injury were required in cases involving the failure of a respondent to have the required bond, all, or almost all, of the bonding violation cases would be dismissed. It would be virtually impossible to predict, in advance, that a particular respondent was *likely* to go broke owing money for livestock. We know from experience that a number of firms will go broke each year and that without the required bond, there will be injury to livestock sellers. But we do not have a crystal ball to enable us to make a finding of fact that the failure of a *particular respondent* to have a bond is *likely* to result in injury.

Similarly, careless or deliberate false weighing is an "unfair" practice under the Act irrespective of any proof of predatory intent or likelihood of injury.[12] Anyone who thinks that the likelihood of injury in a false weighing case is obvious is unaware of the intricacies of false weighing violations. For example, a livestock buying station might increase the price to compensate for the short weight, or regular buyers at a livestock auction market, who would know of the short weights, might increase their bids in consideration of the short weights. All false weighing is routinely held to be an "unfair" practice,

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[12] *In re Muehlenthaler*, 37 Agric. Dec. 313, 321, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Loretz*, 36 Agric. Dec. 1087, 1095 n.5 (1977); *In re Townsend*, 35 Agric. Dec. 1604, 1622 (1976); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1819 (1975); *In re Worsley*, 33 Agric. Dec. 1547, 1577 n.24 (1974); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 526 n.24 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Speight*, 33 Agric. Dec. 280, 317 n.24 (1974).

without proof as to whether there is a likelihood of injury, and in many cases, it would have been difficult, if not impossible, to prove such a likelihood.

Specifically, with respect to custodial account violations, the Department has always taken the position that it is an unfair practice for a livestock auction market to fail to properly maintain a Custodial Account for Shippers' Proceeds irrespective of any likelihood of injury.[13] And as shown in § II, *supra*, in custodial account violation cases, the Department has never been required to prove a likelihood of injury. In fact, in most such cases, the Department would be unable to prove a likelihood of injury.

Although we know from experience that about 10 to 20 auction markets go broke each year, and that about 3 to 6 of them will not have a bond adequate to cover the total losses, we do not have a crystal ball that would enable us to make a finding of fact that the failure of a *particular respondent* to maintain his custodial account properly is *likely* to result in injury.

As stated in Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 282 (1981) (footnotes omitted):

> The fact that no one suffered from a particular custodial account shortage is no defense, since it is the duty of the Packers and Stockyards agency to prevent potential injury by stopping unlawful practices in their incipiency. However, if the likelihood of injury test as applied in some judicial decisions were applied to custodial account violations, most of the complaints filed alleging custodial account violations would be dismissed. Rarely would it be possible to prove that injury would likely result from a particular custodial account shortage. Usually there would be a reasonable expectation that the time lag between the writing and cashing of the checks would prevent a default. Frequently there would be a line of credit from the bank. Almost always there would be a bond that could be relied on to cover part of any losses.
>
> The most that could be shown is that if all or many of the market agencies selling livestock generally had custodial account shortages, there would be a likelihood that some of them would result in injury. Accordingly, it is the department's position that where there is a custodial account shortage, there is no need to show injury or

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[13] *In re George County Stockyard, Inc.*, 45 Agric. Dec. 2342, 2349 (1986); *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590, 594-95, 597-98, 600-05, 621-22 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 244, 246-47 (1986) (decision as to Millspaugh); *In re Powell*, 41 Agric. Dec. 1354, 1361 (1982); *Pratt v. United States*, 276 F.2d 308, 309-13 (10th Cir. 1960); *Daniels v. United States*, 242 F.2d 39, 41-42 (7th Cir.), *cert. denied*, 354 U.S. 939 (1957); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1020-23 (8th Cir. 1932); *In re Roseth*, 39 Agric. Dec. 28, 36 (1980), *aff'd per curiam*, 636 F.2d 1224 (8th Cir. 1980) (unpublished); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 310-11, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Sechrist Sales Co.*, 36 Agric. Dec. 665, 667, 673 (1977); *In re Hardy*, 33 Agric. Dec. 1383, 1398-1406 (1974); *In re Miller*, 33 Agric. Dec. 53, 59-62, *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974); *In re Bowman*, 23 Agric. Dec. 1065, 1068-71 (1964); *In re Bowman*, 23 Agric. Dec. 1074, 1086-87 (1964), *aff'd*, 343 F.2d 81, 85-86 (5th Cir. 1966).

likelihood of injury in a particular case. No court has required proof of a likelihood of injury in custodial account violation cases.

Accordingly, even if the cases under the Packers and Stockyards Act requiring proof of predatory intent or likelihood of injury were regarded as sound with respect to the types of violations involved in those cases, there are many other types of violations under the Packers and Stockyards Act where predatory intent or likelihood of injury has never been required. If the likelihood of injury test were to be applied to this custodial account case, it would seriously impair the Department's financial protection program, that has fostered a high degree of confidence in the public livestock marketing system. That would be highly damaging not only to respondents, but, also, to all other public livestock markets in the United States.

IV. The 1982 Custodial Account Regulations Have Substantive Effect (1) Because They Were Issued as Legislative (Rather Than Advisory) Rules Having the Force and Effect of Law, or (Alternatively) (2) Because of the Lengthy Period of Existence and Acceptance of Custodial Account Regulations and the Long History of Consistent Enforcement.

Authority to issue regulations under the Packers and Stockyards Act is contained in § 402 of the Act (7 U.S.C. § 222), which adopts by reference the authority of the Federal Trade Commission (FTC) to issue regulations,[14] and in § 407 of the Act (7 U.S.C. § 228(a)).[15] For many years, both the FTC and the Packers and Stockyards agency took the position that their regulations were merely advisory and did not have the force and effect of law.[16] However, when the FTC changed its position and contended that its regulations have the force and effect of law, its new position was sustained in 1973. *National*

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[14]Federal Trade Commission Act, Pub. L. No. 203, § 6(g), 38 Stat. 721 (1914) (current version at 15 U.S.C. § 46(g)). The FTC Act was amended in 1975 to require specific rulemaking proceedings before the FTC can issue a rule defining with specificity acts or practices which are unfair or deceptive (15 U.S.C. §§ 46(g), 57a), but that requirement was not in the FTC Act when it was adopted by the Packers and Stockyards Act, and it has generally been held that the adoption of a statute by reference is an adoption of the law as it existed at the time the adopting statute was passed, and therefore is not affected by any subsequent amendment of the statute adopted. *In re Heath*, 144 U.S. 92, 93-96 (1892); Annot., 2 L.Ed.2d 2048 (1957).

[15] § 228. Authority of Secretary

(a) Rules, regulations, and expenditures; appropriations

The Secretary may make such rules, regulations, and orders as may be necessary to carry out the provisions of this chapter. . . .

[16]*In re Central Coast Meats, Inc.*, 33 Agric. Dec. 117, 134-36 (1974), *rev'd on other grounds*, 541 F.2d 1325 (9th Cir. 1976) (2-1 decision); and see *Fairbank v. Hardin*, 429 F.2d 264, 269 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970); *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1021-22 (8th Cir. 1932).

Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 673-98 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

In a rulemaking proceeding in 1974, the Administrator of the Packers and Stockyards Administration stated that the rule then being issued "is deemed to be of an advisory nature," but he stated that the Act "authorizes the Secretary to issue substantive as well as procedural and advisory regulations necessary to carry out the provisions of the Act" (39 Fed. Reg. 17,529, 17,537 (1974)). Accordingly, the "determination will have to be made on a case by case basis as to whether a particular regulation is advisory or has the force and effect of law." Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 202 (1981).

The 1921 custodial account regulation involved in *United States v. Donahue Bros., Inc.*, 59 F.2d 1019 (8th Cir. 1932), was issued before the FTC regulations were construed in 1973 as having the force and effect of law and, therefore, the 1921 custodial account regulation was merely advisory (see § § I(A), II(A), *supra*).

Similarly, the regulation involved in *Farrow v. USDA*, 760 F.2d 211, 213 (1985) (9 C.F.R. § 201.70), was issued in 1959 (24 Fed. Reg. 3182, 3183 (1959)), and the court quoted the Department's brief stating that those regulations "have been interpreted as purely advisory" (760 F.2d at 213 n.4).

However, the 1982 custodial account regulations (i) were issued after the 1973 change of position as to the effect of FTC regulations, (ii) were adopted in accordance with the requirements of the Administrative Procedure Act as to the issuance of legislative rules (notice of proposed rulemaking and opportunity to file comments was published in the Federal Register (45 Fed. Reg. 87,002, 87,003, 87,005-06 (1980); 47 Fed. Reg. 4668 (1982)), and (iii) relate to subject matter regulated since 3⅓ months after the statute was enacted in 1921. Accordingly, the 1982 custodial account regulations should be regarded as legislative rules.

In recent years, it has been held that a P&S regulation as to packer purchases of livestock on credit (9 C.F.R. § 201.200) is a substantive rule having the force and effect of law. *First State Bank of Miami v. Gotham Provision Co.*, 669 F.2d 1000, 1004-08 (5th Cir.), *cert. denied*, 459 U.S. 858 (1982); *In re Frosty Morn Meats, Inc.*, BK 77-31707, slip op. at 34-35 (Bankr. Ct. M.D. Tenn. Oct. 2, 1978) ("exact language" specified in the regulations required), *aff'd*, 7 Bankr. Rep. 988 (M.D. Tenn. 1980), *appeal dismissed*, No. 81-5158 (6th Cir. Apr. 23, 1981).

In *United States v. Marshall Durbin & Co.*, No. CV 84-PT-1920-S, slip op. at 24-32 (N.D. Ala. Sept. 11, 1985), the court referred to the 1973 change of position as to the effect of FTC rules, and as to its possible applicability to P&S rules. The court quoted with approval Davis, *1982 Supplement to Administrative Law Treatise* 175 (1982), which states:

> A typical statute which provides in broad terms that an agency has authority to issue regulations to carry out the statute should be interpreted to mean that the agency may issue legislative rules, not merely interpretative rules. National Ass'n of Pharmaceutical Mfrs.

v. Food and Drug Administration, 637 F.2d 877 (2d Cir. 1981); see the discussion of the case in § 6:8.

However, the court held that the regulation involved there should be construed as an interpretative rule because of the Department's failure to comply with the Administrative Procedure Act requirements as to substantive rules.

Nonetheless, the court, in *United States v. Marshall Durbin & Co., supra*, recognized that (slip op. at 30):

> Some P&SA regulations which are advisory may have substantive effect due to a lengthy period of existence and acceptance or a long history of consistent enforcement.

Assuming that the 1982 custodial account regulations are not construed as legislative regulations having the force and effect of law, they should, nonetheless, be construed as having substantive effect because custodial account regulations have been in effect since 1921, they have been accepted by the industry and the courts, and there has been a long history of consistent enforcement of custodial account regulations (see § § I, II, *supra*).

Furthermore, the 1982 custodial account regulations set forth the very minimum requirements that would be applicable to a fiduciary handling trust funds, even in the absence of regulations.

Paragraph (a) of the regulations (9 C.F.R. § 201.42(a)) merely states that payments for livestock made to a market agency are trust funds, and that funds deposited in custodial accounts are trust funds.

Paragraph (b) of the regulations (9 C.F.R. § 201.42(b)) merely requires a market agency to maintain a separate bank account for custodial funds, identified in a manner to reveal the trust nature of the account.

Paragraph (c) of the regulations (9 C.F.R. § 201.42(c)) merely requires that all funds collected from the sale of livestock be deposited in the custodial account (thereby forbidding the commingling of such trust funds with the market agency's personal funds). It also sets forth the time limits when such deposits must be made, and when all proceeds receivable must be deposited.

As to the requirement that the trust funds be deposited directly to the custodial account rather than commingled with the market agency's personal account, "the law has always looked with disfavor upon the practice of one who in such a [fiduciary] position . . . commingled [trust funds] with his own." *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022 (8th Cir. 1932).

With respect to the time limits for depositing funds in the custodial account, the time limits set forth in subsection (c) are very lenient. The market agency has until the close of the next (banking) business day to deposit the proceeds collected from the sale. In addition, by the close of the next (banking) business day, the market agency must deposit an amount equal to the proceeds receivable from the sale of livestock to the market agency and its owners, officers or employees. This is necessary to prevent the market agency from using custodial funds to finance the market's own purchases or the purchases of its owners, officers and employees (see § II, *supra*). Without this requirement, the market agency would be using custodial funds to finance such purchases which, in effect, would be using custodial funds as its own.

The "law has always looked with disfavor upon the practice of one who in such a [fiduciary] position used such property [livestock trust funds] as his own. . . ." *United States v. Donahue Bros., Inc.*, 59 F.2d 1019, 1022 (8th Cir. 1932).

As to the requirement in subsection (c) (9 C.F.R. § 201.42(c)) that the market agency must, before the close of the 7th day following the sale of livestock, deposit an amount equal to the remaining proceeds receivable, whether collected or not, this is a significant lessening of the burden on market agencies than had previously been in effect. Prior to the 1982 amendment, the market agency was required to deposit such amount in the custodial account by the 3rd day following the sale of consigned livestock (§ I(D)).

The fact that a market agency is using shippers' proceeds for its own purpose (of extending credit to buyers) if it does not promptly deposit its own money into the custodial account when buyers do not promptly pay the market, is explained in *In re Bowman and Reynolds*, 23 Agric. Dec. 1065, 1069 (1964), as follows:

> Since respondents maintain shippers' proceeds accounts which are credited with sales proceeds received and debited for shippers' portions of sales proceeds paid out, the failures of respondents to collect the proceeds of sales promptly and to deposit these to the credit of the account, or to deposit in the account equivalent amounts of their own funds, amounted in effect to debits against the account and the funds in the account to the extent of the deficiencies. In other words, the shippers' proceeds accounts, that is, the trust funds in the accounts, were used to extend credit to certain purchasers who did not promptly pay for their purchases. Of course, there was no *direct* diversion of the funds in the sense of a physical drawing out of the trust funds from the account but the operation of the account as if the sales proceeds that were delinquent were deposited to the credit of the account had the same effect. This was a use of shippers' proceeds for respondents' own purposes. If respondents wish to extend credit to purchasers this should be done through the use of respondents' money rather than shippers' proceeds.

Actually, it would not be unreasonable for the Secretary to require a market agency to have all of the money in the custodial account necessary to cover each check written. The regulation, by permitting the market agency a period of 7 days (previously 3 days) within which to deposit the proceeds receivable from the sale of livestock, permits the market agency to write checks based on the float in the custodial account, rather than on actual funds in the account. The Judicial Officer recognized long ago that permitting market agencies to write checks based on the float in their custodial accounts is a questionable practice. He stated (*In re Bowman and Reynolds*, 23 Agric. Dec. 1065, 1069 n.1 (1964)):

> By reason thereof [i.e., because "the normal period for payment of livestock purchased at these markets is three days" (23 Agric. Dec. at 1068-69)], complainant credited respondents' custodial accounts with "proceeds receivable", that is, accounts receivable for livestock sold not

more than three days earlier, in computing whether there were shortages in such accounts, and did not include older accounts receivable. Theoretically, at least, no such distinction need have been made with respect to receivables, that is, receivables need not have been considered in determining whether a shortage existed in the custodial accounts. The possibility of future deposits is not an adequate basis for the issuance of checks, especially when a trust account is involved. However, complainant did allow for the usual and normal period for payment of livestock purchased in determining whether shortages existed in the custodial accounts. Respondents can hardly complain.

V. Respondents' Violations Were Willful.

Under the Administrative Procedure Act, a suspension order cannot be issued unless the violations were willful or a prior warning letter was sent. Specifically, the Act provides (5 U.S.C. § 558(c)):

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given--
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Respondents' violations were willful, within the meaning of that term in the Administrative Procedure Act. As stated in *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir. 1974):

> Moreover, the "second chance" doctrine would apply only if the violations had not been willful. It is clear enough that under § 9(b), doing an act which is prohibited and doing it intentionally "irrespective of evil motive or reliance on erroneous advice" or "acts with careless disregard of statutory requirements" are willful. *See* Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961); *see also* United States v. Illinois Central Railroad Co., 303 U.S. 239, 243, 58 S.Ct. 49, 82 L.Ed. 518 (1938).

Similarly, in *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961), the court held:

> Petitioner urges his denial of trading privileges amounted to a suspension of a license, and that section 9(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1008(b), was violated. We do not reach that question for the same section excludes cases of wilfulness. We hold the petitioner's conduct was wilful within the meaning of section 9(b) of the Administrative Procedure Act. We think it clear that if a person 1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or 2) acts with careless disregard of statutory requirements, the violation is wilful. Eastern Produce Co. v. Benson, 3 Cir., 278 F.2d 606, 609.

See also, *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 778 (1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 997 (1981). The definition of willful under the Administrative Procedure Act is discussed at length in *In re Shatkin*, 34 Agric.

Dec. 296, 297-314 (1975). The cited pages from *Shatkin* are set forth as Appendix A to this decision.[17]

Finally, in *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-88 (1973), the Court expressly held that registrants may be suspended under the Packers and Stockyards Act (7 U.S.C. § 204) for negligent or careless violations that are not intentional or flagrant, stating:

> The Secretary may suspend "for a reasonable specified period" any registrant who has violated any provision of the Act. 7 U.S.C. § 204. Nothing whatever in that provision confines its application to cases of "intentional and flagrant conduct" or denies its application in cases of negligent or careless violations. Rather, the breadth of the grant of authority to impose the sanction strongly implies a congressional purpose to permit the Secretary to impose it to deter repeated violations of the Act, whether intentional or negligent. *Hyatt v. United States*, 276 F.2d 308, 313 (CA 10 1960); *G.H. Miller & Co. v. United States*, 260 F.2d 286 (CA 7 1958); *In re Silver*, 21 Agric. Dec. 1438, 1452 (1962).[5] The employment of

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[5] It is by no means clear that respondent's violations were merely negligent. The hearing examiner found that respondent had "intentionally" underweighed livestock, and the Judicial Officer stated: "We conclude then, as did the hearing examiner, that respondent *wilfully* violated . . . the act." (Emphasis added.) "Wilfully" could refer to either intentional conduct or conduct that was merely careless or negligent. It seems clear, however, that the Judicial Officer sustained the hearing examiner's finding that the violations were "intentional."

> a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. *FCC v. WOKO*, 329 U.S. 223, 227-228 (1946); *FTC v. Universal-Rundle Corp.*, 387 U.S., at 250, 251; *G.H. Miller & Co. v. United States, supra*, at 296; *Hiller v. SEC*, 429 F.2d 856, 858-859 (CA 2 1970); *Dlugash v. SEC*, 373 F.2d 107, 110 (CA 2 1967); *Kent v. Hardin*, 425 F.2d 1346, 1349 (CA 5 1970).
>
> Moreover, the Court of Appeals may have been in error in acting on the premise that the Secretary's practice was to impose suspensions only in cases of "intentional and flagrant conduct." [Footnote omitted.]

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[17] *Shatkin* explains (34 Agric. Dec. at 306-14) that the decision in *Economou v. USDA*, 494 F.2d 519 (2d Cir. 1974), which held that the violations under the Commodity Exchange Act were not willful because the "customary warning letter" was not sent, is erroneous because it nullifies the willfulness exception in the Administrative Procedure Act. Furthermore, it is not the practice (or custom) under the Packers and Stockyards Act to send a warning letter, in the case of serious violations. *See, e.g.*, Campbell, *The Packers and Stockyards Act Regulatory Program*, in 1 Davidson, Agricultural Law 271 (1981 and 1987 Cum. Supp.); *In re White*, 47 Agric. Dec. ___, slip op. at 118 (Jan. 11, 1988), *appeal docketed*, No. 88-3144 (6th Cir. Feb. 22, 1988); *In re DeQuoin Packing Co.*, 41 Agric. Dec. 1367, 1381 n.2 (1982); and *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1135 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978). My decision in *In re Economou*, 32 Agric. Dec. 14 (1973), *rev'd*, 494 F.2d 519 (2d Cir. 1974), explaining that Arthur N. Economou willfully failed to meet the minimum financial requirements of the Commodity Exchange Act by puffing up assets and underreporting liabilities in transactions with commonly controlled companies, including the American Board of Trade, had it not been reversed by the court, would have sounded the death knell of the American Board of Trade (according to Mr. Economou (32 Agric. Dec. at 125)), before investors put in about $79 million. The American Board of Trade recently went broke costing investors about $49 million. See The Wall Street Journal, Feb. 3, 1987, at 50, col. 3.

> The Secretary's practice, rather, apparently is to employ that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion. Therefore, mere unevenness in the application of the sanction does not render its application in a particular case "unwarranted in law."

In the present case, respondents have voluntarily chosen to engage in a highly regulated business. It is their responsibility, as registrants under the Act, to keep themselves informed as to all of the provisions of the Act and regulations. Complainant does not have to prove, as an element of willfulness, that respondents actually knew of the regulatory requirements.

The record does show, however, that complainant took every reasonable measure to inform respondents of the custodial account requirements. On September 15, 1982, letters were mailed to both of respondents' auction markets (CX 1, pp. 1-2; Tr. 8, 111-12, 119-20). The letters state (CX 1, pp. 1-2) (emphasis added):

> Section 201.42 of the regulations issued under the Packers and Stockyards Act, 1921, was amended effective August 30, 1982. This regulation sets forth the current requirements for the establishment and maintenance of custodial accounts for shippers' proceeds.
>
> The principle changes in the regulation:
>
> 1. Provide for reimbursement of the custodial account for uncollected proceeds within 7 calendar days instead of 3 business days as was previously required;
>
> 2. Provide for maintenance of custodial funds in interest-bearing savings accounts as well as certificates of deposit (the savings account or certificate of deposit must be in the same bank in which the custodial account is maintained and the market agency must maintain sufficient funds in the custodial account to pay all checks as they are presented);
>
> 3. *Clarify the requirement that the proceeds received be deposited directly to the custodial account unless the account has been reimbursed in full for the uncollected proceeds*; and
>
> 4. Eliminate the net method of handling custodial funds.
>
> A copy of the amended regulation is enclosed for your information. If you have any questions, please feel free to contact this office.

As shown in § I(E), *supra*, the regulation, which was enclosed in the letter addressed to each of respondents' markets, expressly states that all proceeds from the sale of livestock must be deposited to the custodial account. Specifically, the regulation effective in 1982 provides (9 C.F.R. § 201.42(c) (emphasis added)):

> (c) *Deposits in custodial accounts. The market agency shall deposit in its custodial account before the close of the next business day* (the next day on which banks are customarily open for business whether or not the market agency does business on that day) after livestock is sold (1) *the proceeds from the sale of livestock that have been collected*, and (2) an amount equal to the proceeds receivable from the sale of livestock that are due from (i) the market agency, (ii) any owner, officer, or employee of the market agency, and (iii) any buyer to whom the market agency has extended credit. *The market agency shall*

> *thereafter deposit in the custodial account all proceeds collected until the account has been reimbursed in full*, and shall, before the close of the seventh day following the sale of livestock, deposit an amount equal to all the remaining proceeds receivable whether or not the proceeds have been collected by the market agency.

The clearly expressed provisions of the regulation do not permit a market agency to deposit the proceeds from the sale of livestock into its general account. All proceeds must be deposited in the custodial account until the custodial account has been reimbursed in full.

In addition, a custodial account instruction booklet was mailed to respondents' markets, which also clearly states that all shippers' money must be deposited directly to the custodial account (CX 1c; Tr. 18, 111-12, 119-20). The instruction booklet states (CX 1c, p. 2) (emphasis added):

> 7. *Deposits to Custodial Accounts*: *All money received on sale day from buyers in payment for livestock sold on a commission basis must be deposited directly to the custodial account before the close of the next business day after the sale day.* Further, the custodial account must be reimbursed before the close of the next business day after the sale for any proceeds due for livestock sold to the market agency, an owner, officer or employee of the market agency, or any buyer to whom the market agency has extended credit. *All money received thereafter* in payment for livestock sold on commission *must be deposited directly to the custodial account until the account has been reimbursed in full.* The account must be reimbursed, in full, within 7 days after the sale day whether or not the proceeds receivable have been collected. (See exhibit B.)

Furthermore, on January 18, 1985, letters were mailed to each of respondents' markets enclosing a copy of the letters sent to their banks, as to the trust nature of the custodial accounts (Tr. 111-12, 119-20; CX 1d, pp. 1-4). The enclosed letter to the banks state, *inter alia* (CX 1d, pp. 2, 4):

> Under the provisions of the Act and the regulations issued thereunder, market agencies are required to establish a custodial account for shippers' proceeds and the gross proceeds from the sale of consigned livestock must be deposited in that account.

Finally, P&S investigator Daniel L. Van Ackeren testified that during the course of an investigation of the Chandler Livestock Commission Co., which is operated by both respondents, he noticed that deposits were being made to the general account, and he advised Mrs. Rodman (the wife and mother, respectively, of the respondents), who is the bookkeeper at Chandler and assists another person as bookkeeper at respondent Paul Rodman's other market, that all proceeds must be deposited into the custodial account, rather than the general account. Mr. Van Ackeren testified (Tr. 15-17, 36-37):

> A. Yes. I was at the market on February 7, 1984. We did a check weighing investigation. There was four of us actually that did the investigation in February. Dell Evenson and I returned to the market on February 8th and we copied a bunch of records in regard to a weighing investigation.
>
> Q. In the course of that investigation, did you ascertain how deposits of proceeds from the sale of livestock was being deposited by the market?

A. Yes. While I was reviewing the records I also looked at their custodial account, deposit slips and checks, and also the general account, and noticed that the proceeds from buyers were going into the general account instead of the custodial account.

Q. Did this investigation involve the preparation of a custodial analysis?

A. No, not at that time.

Q. So you did not determine whether there was a shortage or -- what you determined was where the checks were being deposited?

A. That's right.

Q. What market was this?

A. This is Chandler. I went to Chandler first.

Q. The market at Chandler is the one being operated which is registered as Paul Rodman and Paul David Rodman, doing business as market agency at the Chandler Stockyards.

A. Yes.

Q. At that market who is the bookkeeper?

A. Mrs. Rodman.

Q. Wife of?

A. Of Paul Rodman.

Q. She handles the custodial accounts?

A. Yes.

Q. Did you have any conversation in February of 1984 with Mrs. Rodman regarding the deposit of proceeds from the sale of consigned livestock?

A. Yes. After I noticed that a lot of the deposits went into the general account, I asked Mrs. Rodman about it and she admitted that they were making the deposits in this general account. And as custodial checks come in they'll transfer money over to the custodial account to cover those.

Q. As purchases checks come in?

A. Yes, purchase checks.

Q. At that particular point in time did you request that any change be made in the proceeds policy?

A. I told Mrs. Rodman that they were required to deposit all the checks, all the proceeds checks into the custodial account; that the regulations had been amended two years ago. And that it appeared they might have been on the net method. But they weren't handling

the net method properly,[18] but that all checks needed to go into the custodial account.

Q. Did Mrs. Rodman make any commitment to you that there would be a change at that time?

A. She said that's the way we've been doing it for some time, it was easy for them that way, and I can't remember if she said she was going to change at that time.

. . . .

Q. Going back to your testimony on direct, you said you talked to Phyllis Rodman?

A. Yes.

Q. As I recall your testimony from my notes, you said regarding the custodial account, I think you said that you believed that you discussed it with her then.

A. No, I know I did.

Q. Earlier you said "I believe I talked to her about it."

A. Well, if I did -- I know I discussed it with her because I was with her all day on the 8th.

Q. You were not doing custodial account audit work?

A. No.

Q. You were doing some other things?

A. Other things which I was also looking at the general account and that's when I noticed that they were making deposits in the general account. And I asked Mrs. Rodman about it.

Q. Did you say to her that there may have to be a change in that, but that the agency would send some kind of letter to her?

A. I don't think so.

Q. Is it possible that you said that and you don't recall?

A. I think I discussed at the time that these changes needed to be made. I think I discussed it in a letter to her at that time.

Mrs. Rodman corroborated the testimony of Mr. Van Ackeren, except that, although she did not remember his exact words, she admitted that he

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[18]Under the net method, a market agency was required to deposit in the custodial account by the next banking business day after the sale an amount equal to all the proceeds from the sale, whether collected or not (§ I(D), *supra*). Respondents did not fully reimburse the custodial account until after the following week's sale. Accordingly, even if respondents had some reason to erroneously believe that, prior to the 1982 amendments, they could (under the net method) lawfully deposit shippers' proceeds into their general account (see note 6, *supra*), they never attempted to comply with the requirement of fully reimbursing the custodial account by the next banking business day after the sale.

told her that respondents needed to change their account, but she had the understanding that they would receive a formal writing to that effect.[19] She testified (Tr. 205, 216):

> Q. Do you remember Mr. Van Ackeren talking to you sometime in 1984?
>
> A. I remember talking to Mr. Van Ackeren. We were doing everything honestly. I had no reason to document the date.
>
> Q. Do you recall what he said to you?
>
> A. He said that we needed to change our account. And my understanding was that we would receive some type of formal writing to that effect.
>
> Q. Do you remember his exact words?
>
> A. No.
>
> . . . .
>
> Q. Mrs. Rodman, am I correct that your testimony was that in 1984 you did not recall Mr. Van Ackeren mentioning custodial accounts in February of 1984?
>
> A. Yes, I had seen him in the office, but he did not say that it needed to be done at that particular time. He said some of these days we were going to have to.
>
> Q. Some of these days?
>
> A. Right. One of these days.
>
> Q. Okay.
>
> A. I can see him sitting on the desk, top of the desk, and he was telling me this.

In effect, respondents' position is that the express instructions sent by P&S to both of their markets are of no real significance because there is no evidence that either respondent personally saw the letters that were addressed to their markets, and that the express statement by a P&S investigator made over a year prior to the earliest violation, that the regulations had been amended in 1982, and that respondents would have to change their custodial account practice, made to a person who is not only the bookkeeper at both markets, but also the wife and mother of the respondents, respectively, is of no consequence since respondents did not receive a gold-engraved invitation (or direction) from P&S telling them that the regulation in effect throughout the nation as to every other market agency also applied to their two markets. Manifestly, respondents' conduct in failing to comply with the regulations was willful, under any meaning that could reasonably be given to that term.

VI. The 35-Day Suspension Order Requested by Complainant Is Appropriate.

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[19] P&S investigator Dell Evenson also corroborated Mr. Van Ackeren's testimony in this respect (Tr. 250-51).

Respondents' violations of the custodial account regulations were very serious violations of the Act. Respondents, by depositing shippers' proceeds into their own accounts instead of the custodial accounts, were using shippers' proceeds as their own, thereby endangering payment to the shippers. Their violations are even more serious than customary since respondents had shortages both in their custodial accounts and general accounts, so that if all checks had been immediately presented for payment, there would not have been sufficient funds in both accounts to satisfy all outstanding checks.

Violations of a fiduciary duty are regarded as particularly serious violations of the Act.[20] This was emphasized in *In re Harry Klein Produce Corp.*, 46 Agric. Dec. ____, slip op. at 56-57 (Feb. 6, 1987), quoting from *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1732-33 (1978), which, in turn, is quoting from *In re Mandell, Spector, Rudolph Co.*, 24 Agric. Dec. 651, 695-96, 701 (1965), *aff'd sub nom. Mandell, Spector, Rudolph Co. v. United States*, 364 F.2d 889 (3d Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967):

> In addition, respondent was operating as a commission merchant or factor in consignment transactions and as a joint venturer in the joint account transaction, in both of which capacities respondent had a *fiduciary* duty to account truly and correctly, to keep adequate and accurate records identifying individual shipments of produce, to remit funds owing and not to commingle the goods of its principals or partners with its own or that of others. It is axiomatic that in this position of trust and confidence discrepancies or confusions created by respondent are to be resolved against it. * * *
>
> * * *
>
> In determining the sanction to be imposed herein, it must be kept in mind that the major violations of the act found herein, that is, the violations of section 2(4) thereof, are, in our opinion, the most serious and flagrant type possible under the act. Such violations involve breaches of fiduciary duty by an agent to his principal and by a joint account partner to his joint venturer. The relationship of respondent to the shippers here was one of trust and confidence calling for a high degree of care, honesty and loyalty to the consignors and joint venturers.

The 35-day suspension order imposed in this case is modest, compared to suspension orders issued in recent cases. It is the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by the administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators. The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re Spencer Livestock Commission*

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[20] *In re Spencer Livestock Comm'n Co.*, 46 Agric. Dec. ____, slip op. at 210-11 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *Midwest Farmers, Inc. v. United States*, 64 F. Supp. 91, 94-102 (D. Minn. 1945) (3-judge court); *In re Welch*, 45 Agric. Dec. 1932, 1949-50 (1986); *In re Saylor*, 44 Agric. Dec. 2238, 2395 (1985) (decision on remand); *In re Bosma*, 41 Agric. Dec. 1742, 1744, 1751-54 (1982), *aff'd in part & rev'd in part*, 754 F.2d 804 (9th Cir. 1984); *In re Sterling Colo. Beef Co.*, 39 Agric. Dec. 184, 211-12 (1980), *appeal dismissed*, No. 80-1293 (10th Cir. Aug. 11, 1980); *In re Collier*, 38 Agric. Dec. 957 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 829 (1979).

Co., 46 Agric. Dec. ____, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988), which is set forth as Appendix B to this decision.[21]

In addition, the sanctions imposed under the Packers and Stockyards Act in recent years have been much more severe than during earlier years, *e.g.*, *In re Murfreesboro Livestock Market, Inc.*, 46 Agric. Dec. ____ (Aug. 13, 1987) (1-year suspension for custodial account violations and various fraudulent activities); *In re Parchman*, 46 Agric. Dec. ____ (May 28, 1987) (90-day suspension and $10,000 civil penalty for weighing violations), *appeal docketed*, No. 87-3701 (6th Cir. July 23, 1987); *In re Rotches Pork Packers, Inc.*, 46 Agric. Dec. ____ (Apr. 13, 1987) ($50,000 civil penalty for failing to pay for meat products); *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ____ (Mar. 19, 1987) (10-year suspension and $30,000 civil penalty for increasing prices and weights in commission purchases), *aff'd*, 841 F.2d 1451 (9th Cir. 1988); *In re Welch*, 45 Agric. Dec. 1932 (1986) (decision as to Benson) ($10,000 civil penalty and 1-year prohibition from engaging in business subject to the Act for fraud by an auction market employee); *In re Garver*, 45 Agric. Dec. 1090 (1986) (2-year suspension for failing to pay for livestock), *aff'd*, 846 F.2d 1029 (6th Cir. 1988) (unpublished); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. 1034 (1986) ($50,000 civil penalty for commercial bribery), *remanded*, 820 F.2d 1103 (9th Cir. 1987); *In re Corn State Meat Co.*, 45 Agric. Dec. 995 (1986) ($50,000 civil penalty for commercial bribery); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. 590 (1986) (6-month suspension for custodial account and check-kiting violations), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. 234 (1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year, for check-kiting, custodial account and payment violations, and purchasing livestock for speculation out of consignments); *In re Saylor*, 44 Agric. Dec. 2238 (1985) (decision on remand) (8-month suspension and $10,000 civil penalty for fraudulent sales and purchases); *In re ITT Continental Baking Co.*, 44 Agric. Dec. 748 (1985), *final consent decision*, 44 Agric. Dec. 1971 (1985) ($10,000 civil penalty for discriminatory promotional allowances); *In re Powell*, 44 Agric. Dec. ____ (Mar. 7, 1985) (5-year suspension for failure to pay for livestock), *appeal denied*, 44 Agric. Dec. 1220 (1985) (appeal not timely filed); *In re Mid-West Veal Distributors*, 43 Agric. Dec. 1124 (1984) ($77,000 civil penalty, with $27,000 suspended, for payment, bond and trust violations); *In re Mayer*, 43 Agric. Dec. 439 (1984) (decision as to respondent Doss) (2-year

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[21]Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, *e.g.*, in *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. 590 (1986), *aff'd*, 810 F.2d 916 (9th Cir. 1987); *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977); *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

suspension for payment violations), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. 1848 (1983) ($20,000 civil penalty for bait-and-switch advertising and deceptive practices), *aff'd*, 770 F.2d 888 (10th Cir. 1985).

In *In re Garver, supra*, 45 Agric. Dec. 1090, 1101-04 (1986), it is explained that 2- to 5-year suspension orders are now issued in the case of serious failures to pay for livestock where 30- to 60-day suspension orders would have been issued in comparable cases a few years ago.

Although there is no basis for respondents to have been ignorant of the law with respect to the custodial account requirements, even if they were, it has never been the policy of this Department to limit severe sanctions to the case of intentional violations, or to violations done with knowledge of their unlawfulness. *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974). I do not recall any contested case where a respondent has admitted that he knew that he was violating the law. Frequently, I infer that certain conduct was intentional and done with knowledge of unlawfulness (which is done for the benefit of reviewing judges who may dislike my hard-nosed sanction policy), but the sanction would be the same irrespective of those circumstances. *In re Worsley*, 33 Agric. dec. 1547, 1556-71 (1974). In *In re Steinberg Bros. Co.*, 43 Agric. Dec. 1878, 1891 and n. 15 (1984), it is explained that "ignorance of the law is never an excuse or even a mitigating circumstance in a disciplinary proceeding under the Act" because:

> If ignorance of the law were a mitigating circumstance, it would be a disincentive to licensees becoming familiar with the regulatory requirements under the Act, which would tend to thwart the purpose of this remedial legislation.

Finally, respondents contend that the criteria in § 312(b) of the Act (7 U.S.C. § 213(b)) must be considered in determining the length of the suspension order. If I were to consider the criteria in 7 U.S.C. § 213(b), I would still suspend respondents for 35 days. But the criteria in 7 U.S.C. § 213(b) are irrelevant to a suspension order. As stated in *Spencer Livestock Commission Co. v. Department of Agriculture*, 841 F.2d 1451, 1457 (9th Cir. 1988), in affirming a 10-year suspension order under the Packers and Stockyards Act:

> **2. Factors Considered Under § 213(b)**
>
> Petitioners contend that factors the statute mandates the ALJ and JO to consider preclude the imposition of a 10-year suspension. Section 213(b) requires the Secretary, before assessing *monetary* penalties, to consider "the gravity of the offense, the size of the business involved, and the effect of the penalty on the person's ability to continue in business." 7 U.S.C. § 213(b). Section 204, which permits the Secretary to *suspend* a registrant "for a reasonable specified period," contains no parallel provision. 7 U.S.C. § 204.
>
> Nonetheless, petitioners argue that it is reasonable to read the § 213(b) factors into § 204, since "it does not appear to be the congressional intent to permit a sanction which has the effect of completely and permanently excluding a person from the livestock marketing industry." Brief of Petitioner at 29.
>
> Petitioners cite no authority for this contention, nor is there any. A more reasonable reading than that advanced by petitioner is that since Congress chose to include the language in one provision and omit

it from the other, it did not require the factors to be considered as to the latter. [Footnote omitted.]

Since the criteria in 7 U.S.C. § 213(b) are irrelevant, respondents' petition to reopen the hearing to receive additional evidence as to those criteria is denied.

For the foregoing reasons, the following order should be issued.[22]

Order

Respondents Paul Rodman and Paul David Rodman, their agents and employees, directly or through any corporate or other device, in connection with their operations subject to the Act, shall cease and desist from:

1. Failing to deposit to their Custodial Accounts for Shippers' Proceeds, within the time prescribed in § 201.42 of the regulations (9 C.F.R. § 201.42), amounts equal to the outstanding proceeds receivable due from the sale of consigned livestock;

2. Using funds received as proceeds from the sale of consigned livestock for purposes of their own or for any purpose other than for the payment of the net proceeds to the owners or consignors of such livestock, or for the payment of sums due the respondents as compensation for services rendered or for other lawful marketing charges;

3. Making such use or disposition of funds in their possession or control as will endanger or impair the faithful and prompt accounting therefor and the payment of the portions thereof which may be due the owners or consignors of livestock; and

4. Failing to otherwise maintain their Custodial Accounts for Shippers' Proceeds in strict conformity with the provisions of § 201.42 of the regulations (9 C.F.R. § 201.42).

Respondents are suspended as registrants under the Act for 35 days and thereafter until they demonstrate that any deficits in their Oklahoma Stockyard and Chandler Stockyard Custodial Accounts for Shippers' Proceeds have been eliminated. When respondents demonstrate that the deficits in their Custodial Accounts for Shippers' Proceeds have been eliminated, a supplemental order will be issued in this proceeding terminating this suspension after the 35-day period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondents. The suspension provisions shall become effective on the 30th day after service of this order on respondents; *Provided, however,* That if by any means or device whatever, all or part of the suspension period is not effectively served during the period indicated above, the effective date of the beginning of the suspension period (or the part thereof not effectively served) shall be (i) the date fixed by a court of competent jurisdiction which issues an appropriate order with respect thereto, or (ii) upon a showing made by complainant that it is not likely that such an order will be entered by any court, the date subsequently fixed by the Judicial Officer (jurisdiction is hereby retained by the Judicial Officer indefinitely for this limited purpose).

APPENDIX A

Excerpt from *In re Shatkin*, 34 Agric. Dec. 296, 297-314 (1975).

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[22]This is one of a group of cases that has been unreasonably delayed in the Office of the Judicial Officer. During 1985 and 1986, the workload of the Judicial Officer doubled. Because of budgetary constraints, an assistant was not obtained until November 2, 1986.

APPENDIX B

Excerpt from *In re Spencer Livestock Commission Co.*, 46 Agric. Dec. ___, slip op. at 213-51 (Mar. 19, 1987), *aff'd*, 841 F.2d 1451 (9th Cir. 1988).
[Excerpts omitted.--Editor.]

In re: JOE VARNER.
P&S Docket No. D 88-12.
Decision filed April 7, 1988.

Operation as market agency without adequate bond--Failure to file answer.

Eric Paul, for complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER UPON ADMISSION OF FACTS BY REASON OF DEFAULT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), herein referred to as the Act, instituted by a complaint filed by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture, charging that the respondent wilfully violated the Act and regulations promulgated thereunder (9 C.F.R. § 201.1 *et seq.*).

Copies of the complaint and Rules of Practice (7 C.F.R. § 1.130 *et seq.*) governing proceedings under the Act were served upon respondent by the Hearing Clerk by certified mail. Respondent was informed in a letter of service that an answer should be filed pursuant to the Rules of Practice and that failure to answer would constitute an admission of all the material allegations contained in the complaint.

Respondent has failed to file an answer within the time prescribed in the Rules of Practice, and the material facts alleged in the complaint, which are admitted by respondent's failure to file an answer, are adopted and set forth herein as findings of fact.

This decision and order, therefore, is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. (a) Joe Varner, hereinafter referred to as the respondent, is an individual whose business mailing address is Box 121, Pierz, Minnesota 56364.

(b) The respondent is, and at all times material herein was:

(a) Engaged in the business of buying livestock in commerce on a commission basis; and

(b) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce for his own account.

2. Respondent was notified by certified mail received July 20, 1987, that the $15,000.00 surety bond he maintained to secure the performance of his livestock obligations under the Act was inadequate and that it was necessary to increase this bond to $40,000.00. Respondent was further notified that if he continued his livestock operations under the Act without providing adequate bond or its equivalent, he would be in violation of section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations. Notwithstanding such notice, respondent continued to engage in the business

of a market agency buying livestock in commerce on a commission basis without maintaining an adequate bond or its equivalent as required by the Act and the regulations until January 15, 1988, when respondent obtained and filed a letter of credit that satisfies his bonding requirement.

Conclusions

By reason of the facts found in Finding of Fact 2 herein, respondent has wilfully violated section 312(a) of the Act (7 U.S.C. § 213(a)), and sections 201.29 and 201.30 of the regulations (9 C.F.R. § § 201.29, 201.30).

Order

Respondent Joe Varner, his agents and employees, directly or through any corporate or other device, shall cease and desist from engaging in business in any capacity for which bonding is required under the Packers and Stockyards Act, as amended and supplemented, and the regulations, without filing and maintaining an adequate bond or its equivalent, as required by the Act and the regulations.

In accordance with section 312(b) of the Act (7 U.S.C. § 213(b)), respondent is hereby assessed a civil penalty in the amount of One Thousand Two Hundred Fifty Dollars ($1,250.00).

The provisions of this order shall become effective on the sixth day after this decision becomes final. Copies hereof shall be served upon the parties.

Pursuant to the Rules of Practice, this decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice (7 C.F.R. § 1.130 *et seq.*).

[This Decision and Order became final May 25, 1988.--Editor.]

MES McCORMICK d/b/a McCORMICK BROTHERS[1] v. SHELLY OBER, STACY STOBER, RICHARD STOBER, d/b/a SANTA YNEZ VESTOCK MARKET.
&S Docket No. 6663.
cision filed May 10, 1987.

nconforming goods--Breach--Notice of intent to cure--Agency.

ere respondents tendered nonconforming cattle and failed to give complainant seasonable lice of intent to cure the breach, complainant is entitled to reparation in the amount of his n payment. Although the contract was disaffirmed by the minor respondents, complainant ntitled to recovery from their father as the principal in fact.

ter V. Train, Presiding Officer.
nk E. Kocs, Paso Robles, California, for complainant.
vid Y. Farmer, San Luis Obispo, California, for respondents.
cision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 21, as amended (7 U.S.C. § 181 *et seq.*), begun by a complaint filed on June , 1985, alleging that respondents breached a contract to sell cattle to mplainant by failing to tender cattle conforming to the terms of the ntract. Complainant claimed damages of $39,124.00.

Copies of the complaint and the investigative report prepared by the ckers and Stockyards Administration of this Department and filed in this oceeding pursuant to the Rules of Practice were served on respondents on ovember 18, 1985. A copy of the investigative report was served on mplainant on November 25, 1985.

Respondents filed an answer denying liability and filed a cross-claim eking $16,675.44 for damages alleged to have been sustained because mplainant failed to accept the tendered cattle. On April 24, 1986, mplainant replied to the cross-claim denying any liability.

An oral hearing was held on May 27, 1987, at San Luis Obispo, California, fore Peter V. Train, Esquire, of the Office of the General Counsel of this partment. Complainant was represented by Frank E. Kocs, Esquire, Paso obles, California. Respondents were represented by Paul F. Ready, Esquire, n Luis Obispo, California.

Complainant called four witnesses and introduced nine exhibits. espondents introduced ten exhibits. Respondent Richard Stober testified on half of respondents.

Respondents filed a brief on July 17, 1987. Plaintiff filed a reply brief on ugust 10, 1987.

Reference to the transcript will use the designation "TR".

Findings of Fact

1. James McCormick, hereinafter referred to as complainant, is an dividual doing business as McCormick Brothers, whose address is 11520 ast 2nd Avenue, Aurora, Colorado 80010.

2. Respondents Shelly Stober and Stacy Stober are the minor daughters f respondent Richard Stober, all of whom are hereinafter referred to as the

[1]The correct spelling of complainant's name is McCormick (TR 36), not McCormack as ated in the complaint and all subsequent pleadings. The complaint and subsequent leadings will be considered amended to correct this error.

respondents. The mailing address of Richard Stober is 2201-A Highway 101, Buellton, California 93427.

3. Richard Stober is, and at all times herein was, engaged in the business of a dealer buying and selling livestock in commerce for his own account, and of a market agency selling livestock in commerce on a commission basis.

4. On December 31, 1984, complainant entered into a contract to purchase 400 head of medium frame #1 muscled choice steers from Shelly and Stacy Stober to be delivered at a date between May 1-20, 1985, the precise date to be determined by the sellers. The price was to be $6.00 behind the Chicago Mercantile Exchange (CME) price on a date established by sellers. Richard Stober prepared and signed the contract as agent for his daughters.

5. Complainant's first notice that the cattle were purportedly solely those of Stober's daughters was receipt of the contract. Complainant did not inquire as to their ages nor was he informed of their ages by Richard Stober.

6. Shelley and Stacy Stober do not purportedly purchase and sell cattle.

7. The cattle to be tendered were purchased by Richard Stober and purportedly given to his children. No evidence was introduced to show when the cattle to be tendered were purchased and in whose name the purchase was made. The money used for this purchase was a loan from Richard Stober to his daughters.

8. Pursuant to the contract, complainant made down payments totalling $16,000.00 to Shelly and Stacy Stober.

9. The price was established by Richard Stober on February 12, 1985, at the CME base price of $72.17 with the contract price therefore being $66.17 per hundredweight.

10. The parties agreed to a delivery date of May 8, 1985.

11. On that date, respondents tendered the cattle at the Marre Ranch, Avila Beach, California, but complainant rejected the cattle.

12. 329 head of the tendered cattle were subsequently graded by Jack Colley, a U.S.D.A. grader, who found that 52 percent of the cattle met the contract specification of medium frame #1.

13. Complainant offered in subsequent meetings with respondent to take the conforming cattle, but respondent refused.

14. During most of the month of May, 1985, complainant was in California purchasing cattle and registered at the Stockton Inn, Stockton, California.

15. On Friday, May 17, 1985, Stober sent a telegram to complainant at complainant's home in Aurora, Colorado, notifying complainant that the cattle called for in the contract would be tendered on May 20, 1985. Delivery of the telegram was refused on May 20, 1985.

16. Complainant purchased replacement cattle from C&C Cattle Company on May 22, 27, and 31, 1985. A total of 996 head weighing 650,240 pounds were purchased at a total price of $423,918.22. This calculates to a price of $65.19 per hundredweight, or less than the contract price.

17. Respondents sold 341 head of the cattle rejected at auction at a net price of $135,442.11.

18. The $135,442.11, plus the $16,000.00 down payment received by Shelly and Stacy Stober, was taken by Richard Stober as repayment for his loan to his daughters.

19. Shortly before the oral hearing herein, Shelly and Stacy Stober as minors disaffirmed the contract.

20. The complaint herein was filed within 90 days of accrual of the cause of action alleged herein.

Conclusions

This case presents several issues which will be addressed seriatim. The first is whether the cattle tendered on May 8, 1985, met the specifications of the contract. If not, whether respondents seasonably notified complainant of their intent to cure their breach and then attempted to make a conforming delivery. If it is determined that the tendered cattle did not meet the contract and no effective "cure" of the breach was made, then the third question is whether complainant may still recover damages for the breach of the disaffirmed contract from Richard Stober as agent for his minor children or as the principal in fact herein. If so, what are complainant's damages herein.

A. SELLERS TENDERED NON-CONFORMING CATTLE

The cattle tendered by respondents on May 8, 1985, clearly did not meet the specifications of the contract. (Exhibit A to complaint) Mr. Colley testified that only 52 percent of the animals he graded were medium frame #1 muscled. (TR 28) Mr. Stober himself admitted that he did not tender 400 head of medium frame #1 steers on May 8, 1985. (TR 161) Complainant was therefore justified in rejecting these cattle.

B. UNDER THE CIRCUMSTANCES OF THIS CASE, THE RESPONDENTS DID NOT GIVE SEASONABLE NOTICE OF THEIR INTENT TO CURE.

Respondents contend that they attempted to deliver conforming cattle by May 20, 1985, to cure the improper tender in accordance with section 2508 of the Commercial Code of the State of California. This provision, which is an adoption of section 2-508 of the Uniform Commercial Code (U.C.C.) provides:

> (1) Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.
> (2) Where the buyer rejects the non-conforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance, the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

In determining whether respondents cured their improper tender, we must first look to whether they gave complainant seasonable notice of their intent to cure. Under section 1-204(3) of the U.C.C., "an action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time." "What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." U.C.C. § 1-204(2); Cal. Comm. Code 1204.

Mr. Stober testified that he left several messages at complainant's hotel, but his telephone calls were never returned. He also sent a telegram to complainant's home in Colorado. It should be noted that the telegram was sent at 5:21 p.m. on Friday, May 17, 1985, and stated that the cattle would be available on Monday, May 20, 1985.

The question is whether these attempts were reasonable and done in a timely manner under the circumstances of this case. It is critical to note that respondents were well aware that complainant was buying feeder cattle for his feedlot in Nevada and that he was going to be in California for most of May

buying the cattle. (*See, e.g.*, TR 61) The parties also agreed to an early delivery date. Although respondents claimed the agreement was the result of a demand by complainant, the fact is that there was no objection. What is significant for purposes of this case is that it shows respondents' knowledge that complainant wanted to get his cattle to the feedlot as soon as possible and that he was busy buying cattle throughout this period.

Furthermore, the parties met again on May 10, 1985, when the cattle were graded by Mr. Colley. Even though the grading clearly showed that the tender was non-conforming, Mr. Stober did not give any indication at that time that he intended to make a subsequent tender. (TR 149) In fact, he refused to accept complainant's offer to take those that Mr. Colley found to be medium frame #1 muscled steers. (TR 19) In this regard, it is interesting to note that the cattle claimed to have been available for retender on May 20, 1985, were purchased on April 1, 1985, for delivery between April 15, 1985, and May 15, 1985. (RX 6) Therefore, as of May 10, 1985, Mr. Stober clearly had access to the cattle which he now contends would conform to the terms of the contract. He nevertheless did not tell complainant that he intended to tender these cattle. Rather he refused to accept complainant's offer to take those cattle that Mr. Colley found to be conforming plus even a few more. Respondents' position as of May 10, 1985, clearly was that the cattle tendered on May 8, 1985, met the contract specifications and they considered Mr. McCormick to be in breach for refusing to accept them.

It is in the context of these facts that the issue as to whether the telephone calls or the telegram were reasonable attempts to notify the complainant of respondents' position must be analyzed. The dates, times and number of telephone calls that Mr. Stober made to the Stockton Inn are unclear. The record is similarly silent as to the content of any messages left. Therefore, under the circumstances, respondents have failed to show that the telephone calls were reasonable notice of their intent to cure.

This brings us to the question of whether the telegram (RX 7) is sufficient notice. The telegram which was sent on Friday, May 17, 1985, at 5:21 p.m. states "Cattle contract with Stacy and Shelly Stover [sic] will be delivered Monday May 20, 1985. Failure to receive and pay is a forfeiture of down payment per contract. Contact 805/238-6791" (RX 7) This telegram is neither adequate notice of intent to cure or timely under the circumstances of this case. The telegram does not state that substitute cattle will be tendered. Rather, a reasonable inference is that this telegram was simply a reiteration of respondents' position that the initial cattle tendered did conform to the contract and that McCormick was in breach of the contract by refusing to accept them. The telegram is at best ambiguous and is, therefore, not seasonable notice of intent to cure.

Furthermore, notice on a Friday evening delivered to McCormick's home address at a time when respondents certainly had reason to believe that he might still be in California is not timely. It is unreasonable to expect that McCormick could secure trucks over the weekend to pick up the cattle even if he did receive the notice and did understand it to mean that substitute cattle were being tendered. To send an ambiguous telegram at the "eleventh" hour is not seasonable notice of intent to cure an improper tender within the meaning of section 2508 of the California Commercial Code. The respondents were therefore in breach of contract.

C. RESPONDENT RICHARD STOBER IS LIABLE FOR DAMAGES

The parties agree that Shelly and Stacy Stober disaffirmed the contract entered into by their father on their behalf. They, therefore, are not liable in

damages for their breach. They do not have to return the consideration received. Cal. Civ. Code § 35.

Complainant contends, however, that Richard Stober is liable because he failed to disclose that his daughters were minors. It is well understood that an agent for a disclosed principal is generally not liable for a breach by his principal. This is not, however, the pertinent question. The issue presented here is whether there was an agency relationship at all. As noted in the *Restatement of the Law, Second*, Agency 2d. Vol. 1 § 1, "the relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control." *Id.* at p.8. In this case, although the contract clearly states that Shelly and Stacy are the sellers, Shelly's testimony was that her father purchased the cattle for herself and her sister with his own money and gave them the cattle. (TR 112) Stober testified that he loaned his daughters the money for the purchase, but conceded that there were no loan documents and no interest charged. (TR 170) The loan was repaid when the cattle were sold. Whether the cattle were titled in the girls' names as a result of a gift from their father or as a result of him loaning them the money, it appears that Richard Stober was the real owner. This conclusion is buttressed by the fact that the replacement cattle to be tendered were Richard Stober's and there is again no evidence that the daughters gave any consideration to him for tendering these cattle. As noted in *In re Sterling Colorado Beef Co.*, 39 Agric. Dec. 184 (1980) "[w]hen it is doubtful whether a representative is the agent of one of the other of two contracting parties, the function of the court is to ascertain the factual relation of the parties to each other and in so doing can properly disregard a statement in the agreement that the agent is to be the agent of one rather than of the other, or a *statement by the parties as to the legal relations which are thereby created. Id.* at 217, emphasis added citing Restatement of Law 2d, Agency 2d, *supra* at pp 8, 9. In this case, Shelly and Stacy Stober were not giving their father any direction. Rather he was clearly making all the decisions on his own. Richard Stober is obviously the person who owned the cattle irrespective of whose name was on the contract. It should be noted in this respect that McCormick's testimony (TR 62, 64) that the daughters' ages were immaterial because he was dealing with Mr. Stober is consistent with this view that Stober was the real owner.

We do not lightly disregard the written language of the contract. However, livestock dealers cannot be allowed to defeat the jurisdiction of the Secretary under the Packers and Stockyards Act by drafting the contract in the name of minors. In *Arnold Livestock Sales Company, Inc. v. Pearson*, 383 F. Supp. 1319, (D. Neb. 1974), the court held that a livestock seller could recover from the Packers and Stockyards Act bond of a livestock dealer who was buying livestock for a disclosed principal, when the disclosed principal failed to pay. While acknowledging the general rule that an agent representing a disclosed principal may not be held liable unless he was expressly made a party to the contract, the court, despite specifically finding that Pearson was an agent for a disclosed principal and was not made a party to the contract, held Pearson liable under the remedial provisions of the Packers and Stockyards Act. *Id.* at 1322, 1323 See also, *United States Fidelity and Guaranty Co. v. Clover Creek Cattle Co.*, 92 Idaho 889, 452 P.2d 993 (1969). Similarly, the salutary purposes of the Act in preventing unfair and deceptive practices in the marketing of livestock will be promoted if Stober as the person who in reality purchased the cattle, negotiated and prepared the contract for their subsequent resale, and

determined which cattle were to be tendered is held liable for the breach of the contract. This is especially so where he failed to disclose his daughters' lack of capacity. *Restatement 2d*, Agency, § 332; *Cheda v. Grandi*, 97 Cal. App. 2d 513, 218 P.2d 97 (1950). Accordingly, Richard Stober will be held liable for damages under the circumstances of this case.

D. COMPLAINANT'S DAMAGES ARE MEASURED BY THE DAMAGES HE SUSTAINED WHEN HE COVERED PURSUANT TO U.C.C. 2-712, NOT THE LIQUIDATED DAMAGES CLAUSE OF THE CONTRACT.

Under Cal. Code § 2712 (U.C.C. 2-712) a buyer may "cover" after a breach by making a good faith purchase without unreasonable delay of goods in substitution for those due from the seller. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages, less expenses saved in consequence of the seller's breach.

The contract herein provides for damages of $50.00 per head should the seller fail to deliver cattle plus the return of any funds received by the seller. Liquidated damages clauses are generally upheld if they are reasonable in light of the anticipated or actual harm caused by the breach and the difficulties of proof of loss. Cal. Code § 2718(1); U.C.C. 2-718(1). A term fixing unreasonably large liquidated damages, is, however, void as a penalty. *Id.*

In this case, McCormick purchased three loads of cattle from C&C Cattle on May 22, 27, and 31, 1985. Respondents' Exhibit 3. A total of 996 head weighing 650,240 pounds were purchased at a total price of $423,918.22. This calculates to a price of $65.19 per hundredweight (cwt). Although the number of head purchased from C&C exceeded the number to be tendered by respondents, it is clear that these were the cattle purchased as replacement cattle. (TR. 79) The price for the Stober cattle was to be $66.17 per cwt. There was no persuasive evidence that the C&C Cattle were of lesser quality, and therefore McCormick purchased his replacement cattle for less than the contract price. Damages in this type of contract, *i.e.*, the difference between market price of substitute cattle and the contract price, is typically readily ascertainable. Under these circumstances to allow McCormick to recover $20,000 as liquidated damages where he purchased substitute cattle at less than the contract price is unreasonable and the liquidated damages clause will not be enforced. *Sybron Corp. v. Clark Hospital Supply Corp.*, 143 Cal. Reptr 306, 76 Cal App 3d 896 (1978). Complainant seems to acknowledge this when he argues in his brief only for the damages incident to the repurchase as cover. Complainant's Brief pp 10, 12-14.

Complainant claims travel expenses of $350.00 and a trucking expense of $2,274.00 as additional damages. The travel is unspecified. Furthermore, it should be noted that McCormick would have been in California anyway to purchase cattle. Complainant has failed to prove that this travel expense was incurred as a result of respondents' breach. It will therefore be disallowed.

Similarly, the amount requested for trucking ($2,274.00) must be disallowed. McCormick testified that he used the trucks procured to pick up the Stober cattle to transport another purchase the next day. (TR 65) Had he not had the Stober trucks available, he would have had to hire more trucks to haul the other purchase. It is unclear how much, if any, expense was saved by having the Stober trucks available. The claimed damages for trucking are thus too speculative for recovery. See, e.g., *Reilly v. Steele*, 11 Agric. Dec. 584 (1952). Complainant has failed to meet his burden of proving damages with respect to travel and trucking expenses.

McCormick is, however, entitled to recovery of his down payment. Although the parties agree that under California law the minor daughters would not have to return the down payment, this conclusion is not relevant to the resolution of this case. Under the circumstances of this case, Richard Stober was the true owner of the cattle with the girls as owners in name only. He "loaned" them the money to buy the cattle. In fact, the girls do not have the down payment, their father does, since he repaid himself through proceeds of the sale and by keeping the down payment. McCormick is, therefore, entitled to the return of his $16,000 down payment. Certainly, the equities of the situation support such a resolution as well. It is patently unfair that the sellers who breached the contract should, nonetheless, keep $16,000.

Respondent Richard Stober shall pay to complainant the sum of $16,000 as damages from Stober's breach. Respondents' cross-claim is denied.

On jurisdiction to issue this order, *see Rice v. Wilcox*, 630 F.2d 586 (8th Cir. 1980); *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Neb. 382, 315 N.W.2d 229 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, 42 F.R. 4395, as authorized by the Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. § 450c-450g. *See also*, Reorganization Plan No. 2 of 1953 (5 U.S.C., 1976 Ed. appendix p. 764). It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act (7 U.S.C. § 210(f)).

Under that section, if respondent Stober does not comply with this order within the time limit in this order, complainant may, within one year of the date of this order, file in the district court of the United States for the district in which is located the principal place of business of respondent, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which it claims damages and this order in the premises. That section further provides that such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders herein shall be *prima facie* evidence of the facts herein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. That section further provides that, if the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

It is requested that copies of all pleadings filed by any party in such suit be filed with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, United States Department of Agriculture, Washington, D.C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see Rule 17 of the Rules of Practice (9 C.F.R. § 202.117).

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission v. Hardin, et al.*, 446 F.2d 4, 30 Agric. Dec. 1063 (8th Cir. 1971). On a complainant's right to judicial review of such an order, see 5 U.S.C. § 702-3 and *United States v. ICC*, 337 U.S. 426 (1949).

Order

The complaint as to Shelly and Stacy Stober is dismissed. Respondents' cross-claim is dismissed.

Within 30 days of the date herein, respondent Richard Stober shall pay to complainant the sum of $16,000.00 plus interest thereon at the rate of 13 percent per annum from July 1, 1985, until paid.

Copies hereof shall be served upon the parties.

CHARLES MOODY and PHILLIP MOODY d/b/a MOODY BROTHERS v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION.
P&S Docket No. 6689.
Decision filed May 10, 1989.

Market agency--Sale of livestock at less than highest price obtainable.

Where market agency sold livestock at less that the highest price it could have obtained, consignor is entitled to reparation. Reparation orders can be issued on the basis of a single transaction.

John J. Casey, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended, 7 USC 181 *et seq.*, begun by a complaint received January 6, 1986 alleging in substance market agency sale of consigned livestock at less than the best price obtainable. The amount claimed was $1,917.68.

Copies of the complaint, and of an investigation report prepared by the Packers and Stockyards Administration of this Department and filed in this proceeding under the Rules of Practice, were served on respondent on February 18, 1986. A copy of the investigation report was served on complainants on February 12. Respondent filed an answer on March 3 which was served on complainants, who timely requested an oral hearing.

An oral hearing as requested was held on July 9, 1986 in Sioux Falls, South Dakota before John J. Casey of the Office of the General Counsel of this Department. No party was represented by counsel. Only complainant Phillip Moody and one witness testified. No exhibit was received. No brief was received.

Findings of Fact

1. Complainants Charles Moody and Phillip Moody at all times material herein engaged in farming near St. James, Minnesota.

2. Respondent Producers Livestock Marketing Association, a corporation, at all times material herein engaged in business as a market agency and dealer buying and selling livestock in commerce on commission and for its own account, operating on the Sioux City Stockyards, Sioux City, Iowa, a posted stockyard subject to the Act, and so registered with the Secretary under the Act.

3. On October 8, 1985, complainants consigned 42 steers to respondent for sale on commission on the Sioux City stockyards. There was no auction that day there, but there was one the next day. Complainants' instructions were to sell them that day if a good price was obtainable, or hold them until the auction the next day if a good price could not be obtained that day.

4. That morning, respondent sold the steers for gross proceeds as follows:

Number of head	price/cwt.	total weight	average weight	amount
13	56.50	16,365	1259	$ 9,246.22
29	52.00	34,150	1178	17,758.00
				$27,004.22

5. The steers could have been sold for more. All but eight could have been sold for at least 58.00/cwt. The eight of lowest quality could have been sold for at least 54.00/cwt. The difference was as follows:

Number of head	price/cwt.	average weight	amount
13	58.00	1259	$ 9,492.86
21	58.00	1178	14,348.04
08	54.00	1178	5,088.96
			28,929.86
			(27,004.22)
			$ 1,925.64

6. The complaint was filed within 90 days of accrual of the cause of action alleged therein.

Conclusions

It is undisputed that on October 7, 1985 complainant Phillip Moody delivered 113 steers to respondent at Sioux City, of which two loads were to be delivered on futures contracts and the rest sold on consignment. Beginning the next morning, October 8, at about 6:00, respondent's agent Gene Cosgrove began sorting the animals for delivery on the futures contracts. By about 7:00, he had identified 84 as suitable for that purpose, knowing that was more than would be needed, and a grader began his work, selecting 71 and leaving the other 13. After that, 42 remained to be sold on consignment, in two pens. One pen contained the 13 which Mr. Cosgrove had identified as suitable for delivery on the futures contracts but had not been needed for that. The other pen contained the other 29.

Mr. Moody testified that he and Mr. Cosgrove agreed that respondent would try to sell the 42 that day, and would hold them over for the auction the next day if a good price could not be obtained that day. He also testified that he departed at about 9:45 a.m. Respondent contended that they were to be sold that day, but Mr. Cosgrove was not at the hearing, and no one else testified who had first hand knowledge of their discussion.

It is undisputed that the 42 animals were sold less than an hour after Mr. Phillip Moody departed. The 29 were weighed at 10:25 a.m., having been sold at $52.00/cwt. The 13 were weighed at 10:27 a.m., having been sold at $56.50/cwt. Complainants contended that the animals should have brought higher prices, that over $58.00/cwt. was paid for similar animals on that market that day, and that the 42 animals should have been held over for the auction the next day if higher prices were not obtainable that day.

Mr. Moody testified that the animals had been purchased from respondent the previous November, in three transactions, of those and other animals weighing an average of 681, 763, and 820 pounds respectively. Mr. John Nelson of the respondent firm testified that records of respondent showed only one sale to complainants, the previous November, of animals weighing an average of 821 pounds. Mr. Moody testified (Tr. 26):

> Q. [by Mr. Nelson] * * * Why did it take 11 months to feed these yearlings out to 1,150 pounds?
>
> A. As these--as we are in a higher roughage program, initially, for the first three or four months of the feeding period, and as the price was going down and anticipated to go up, we did not push the cattle.

Mr. Moody described them as follows (Tr. 11):

> Q. [by the presiding officer] How would you describe the 13 and how would you describe the 29?
>
> A. The 13 were number one choice cattle, without a doubt, and the 29, as I stated, there was perhaps 21 cattle of high choice and, perhaps, eight steers could be counted as lesser quality.

Mr. Nelson who testified never saw them. Mr. Cosgrove, who saw them, was not at the hearing. No one else who saw them was at the hearing. No subpoena was requested.

We take as true Mr. Moody's testimony as to the quality of the animals, and that respondent was to hold them for the auction the next day if a good price could not be obtained for them that day. The basis for this is that testimony of Mr. Moody was credible, and was not contradicted by testimony of Mr. Cosgrove or anyone else who saw the cattle or had first hand knowledge of what was said between Messrs. Moody and Cosgrove on the day in question.

We conclude that the animals would have sold for at least $59.00 per cwt. if they had been sold the next day on the Sioux City terminal market, on the basis of the above, and the weekly livestock quotations of the Livestock Division, Agricultural Marketing Service, this Department, for that market, for the week ended October 11, 1985, which show that on October 9 such steers sold at 5900-6200. Those quotations are Department records of which we take official notice.

Complainants claimed the difference between the prices obtained for the animals, and 58.00/cwt. for all but eight of the lighter ones, and $54.00/cwt. for those eight. The difference is set forth above in the Findings of Fact. The evidence in the record, together with the above-mentioned weekly quotations, establishes their entitlement to at least that if not more.

On sale by a market agency of consigned livestock at less than the highest available bid as an unfair practice in violation of Section 307 of the Act, see 9 CFR §201.56 and *Curnow v. Cal. Livestock Mkt. Assn.*, 34 Ag. Dec. 1665 (1975).

On the jurisdiction to issue a reparation order on the basis of a single transaction see *Hays Livestk. Com'n. Co., Inc. v. Maly Livestk. Com'n. Co., Inc.*, 498 F.2d 925, 33 Ag. Dec. 1122 (10 Cir. 1974); *Rice v. Wilcox*, 630 F.2d 586, 39 Ag. Dec. 883 (8 Cir. 1980); *Rowse v. Platte Valley Livestock, Inc.*, 597 F. Supp. 1055, 604 F. Supp. 1463 (D. Nebr. 1985); *Neugebauer v. Ryken*, Civ. 74-4018, U.S.D.C., D. So.Dak., So. Div., 1975, 34 Ag. Dec. 1712; and *Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc.*, 210 Nebr. 382, 315 N.W.2d 229, 41 Ag. Dec. 48 (1982).

This decision and order is the same as a decision and order issued by the Secretary of Agriculture, being issued pursuant to delegated authority, 7 C.F.R. § 2.35, as authorized by Act of April 4, 1940, 54 Stat. 81, 7 U.S.C. 450c-450g. See also Reorganization Plan No. 2 of 1953, 5 U.S.C., 1976 Ed., appendix p. 764. It constitutes "an order for the payment of money" within the meaning of section 309(f) of the Act, 7 U.S.C. 210(f), which provides for enforcement of such an order by court action instituted by a complainant.

It is requested that copies of all pleadings filed by any party in any such suit be filed with the Hearing Clerk, USDA, Washington, D.C. 20250, for inclusion in the file on this reparation proceeding. It is further requested that if the construction of the Act, or the jurisdiction to issue this order, becomes an issue in any such suit, prompt notice of such fact be given to the Office of the General Counsel, USDA, Washington, D.C. 20250.

On a petition to reopen a hearing, to rehear or reargue a proceeding, or to reconsider an order, see rule 17 of the Rules of Practice, 9 CFR § 202.117.

On a respondent's right to judicial review of such an order, see *Maly Livestock Commission v. Hardin et al.*, 446 F.2d 4, 30 Ag. Dec. 1063 (8 Cir., 1971) and *Fort Scott Sale Co., Inc. v. Hardy*, 570 F. Supp. 1144, 42 Ag. Dec. 1079 (D. Kan. 1983).

Order

Within 30 days of the date of this order, respondent Producers Livestock Marketing Association shall pay to complainants Charles Moody and Phillip Moody, with interest thereon at the rate of 13% per annum from December 1, 1985 until paid, $1,925.64.

Copies hereof shall be served on the parties.

DISCIPLINARY DECISIONS

In re: RICHARD ITULE PRODUCE, INC.
PACA Docket No. 2-7574.
Decision filed March 15, 1988.

Failure to make full payment promptly--Failure to file answer.

Allan R. Kahan, for complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*) hereinafter referred to as the "Act", instituted by a complaint filed on July 7, 1987, by the Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period February 1986 through June 1986, respondent purchased, received, and accepted, in interstate and foreign commerce, from nineteen (19) sellers, 123 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $447,295.01.

A copy of the complaint was served upon respondent, which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a Default Order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. 1.139).

Findings of Fact

1. Respondent, Richard Itule Produce, Inc., is a corporation, whose address is 3601 N. 36th Avenue, Phoenix, Arizona 85019.

2. Pursuant to the licensing provisions of the Act, license number 861387 was issued to respondent on June 17, 1986. This license was terminated on June 17, 1987, when respondent failed to pay for its renewal.

3. As more fully set forth in paragraph 5 of the complaint, during the period February 1986 through June 1986, respondent purchased, received, and accepted in interstate and foreign commerce, from nineteen (19) sellers, 123 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the agreed purchase prices, in the total amount of $447,295.01.

Conclusions

Respondent's failure to make full payment promptly with respect to the 123 transactions set forth in Finding of Fact No. 3, above, constitutes willful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. 499b), for which the Order below is issued.

Order

A finding is made that respondent has committed willful, flagrant and repeated violations of Section 2 of the Act (7 U.S.C. 499b), and the facts and circumstances set forth above, shall be published.

This order shall take effect on the 11th day after this Decision becomes final.

Pursuant to the Rules of Practice governing procedures under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 o the Rules of Practice (7 C.F.R. 1.139 and 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 5, 1988.--Editor.]

In re: WALLA WALLA PRODUCE COMPANY.
PACA Docket No. 2-7476.
Decision issued March 18, 1988.

Failure to make full payment promptly--Failure to file answer.

Ben Bruner, for complainant.
Respondent, pro se.
Decision and Order issued by Victor W. Palmer, Chief Administrative Law Judge.

DECISION AND ORDER

This is a disciplinary proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), hereinafter referred to as the "Act", instituted by a complaint filed on March 26, 1987, by the Deputy Director, Fruit and Vegetable Division, Agricultural Marketing Service, United States Department of Agriculture. It is alleged in the complaint that during the period August 1985 through February 1986, respondent failed to make full payment promptly to 42 shippers of the net proceeds or balances thereof in the total amount of $237,453.89 in connection with 172 lots of vegetables and fruits received and accepted in interstate commerce.

A copy of the complaint was served upon the respondents which complaint has not been answered. The time for filing an answer having run, and upon the motion of the complainant for the issuance of a default order, the following Decision and Order is issued without further investigation or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. The mailing address of Walla Walla Produce Company is P.O. Box 664, Walla Walla, Washington 99362.

2. Pursuant to the licensing provisions of the PACA, on March 28, 1933, license number 663548 was issued to respondent, nut such license terminated on March 28, 1986, pursuant to section 4(a) of the PACA (7 U.S.C. § 499(a)), when respondent failed to pay the annual renewal fee.

3. At all times material herein, the respondent was operating subject to license under the PACA as a commission merchant, dealer or broker as those terms are defined under Section 1 of the PACA (7 U.S.C. § 499a), and under the direction, management and control of the individual respondent.

4. As more fully set forth in paragraph 6 of the complaint, during the period August 1985 through February 1986, the individual respondent received and accepted in interstate commerce, 172 lots of fruits and vegetables, all being perishable agricultural commodities, but failed to make full payment promptly of the net proceeds in the amount of $237,453.89.

Conclusions

Respondent's failure to make full payment promptly with respect to the 172 transactions set forth in Finding of Fact No. 4 above constitute wilful, repeated and flagrant violations of Section 2 of the Act (7 U.S.C. § 499b), for which the Order below is issued.

The facts and circumstances of the violations of the PACA set forth in this decision shall be published.

This Order shall take effect on the first day after this Decision becomes final.

Pursuant to the Rules of Practice governing proceedings under the Act, this Decision will become final without further proceedings 35 days after service hereof unless appealed to the Secretary by a party to the proceeding within 30 days after service as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. § § 1.139, 1.145).

Copies hereof shall be served upon parties.

[This Decision and Order became final May 26, 1988.--Editor.]

EAST COAST POTATO DISTRIBUTORS, INC. v. CHRIS SPIRIDIS d/b/a EASTERN FARMERS EXCHANGE CO.

PACA Docket No. 2-7198.
Decision issued May 4, 1988.

Damages--consignments--Allowance when accounting not utilized--Duty to resell potatoes promptly.

Complainant sold respondent potatoes which were rejected because of condition defects after inspection, but which were handled by respondent as consignment. Respondent failed to handle potatoes properly by making a prompt and proper resale of them. Respondent was allowed 150% of the percentage of the condition defects shown on inspection as an allowance off the contract price because the potatoes were culls.

Edward M. Silverstein, Presiding Officer.
Bernard G. O'Mara, Presque Isle, Maine, for complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

Preliminary Statement

This is a reparation proceeding brought pursuant to the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $24,938.24 in connection with five transactions in interstate and foreign commerce involving potatoes, a perishable agricultural commodity.

Both parties were served with copies of the Department's report of investigation. Also, respondent was served with a copy of the formal complaint, and filed an answer thereto denying any liability to complainant with respect to the subject shipments. Additionally, the respondent filed a counterclaim against complainant in the amount of $50,000.00 in connection with the same transactions which are made the subject of the complaint.

Although the amount involved exceeded $15,000.00, the parties waived oral hearing. Therefore, the shortened procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) was followed. Pursuant to this procedure, the verified pleadings of the parties are considered as part of the evidence in the case, as is the Department's report of investigation. In addition, the parties were given the opportunity to submit further evidence by way of verified statements, but neither party did so. Complainant filed a brief.

Findings of Fact

1. Complainant, East Coast Potato Distributors, Inc., is a corporation whose mailing address is P.O. Box 843, Presque Isle, Maine 04769.

2. Respondent, Chris Spiridis, is an individual doing business as Eastern Farmers Exchange Co. whose mailing address is 561 Acorn Street, Unit 5, Deerpark, New York 11729.

3. At all material times, both parties were licensed under the Act.

4. On or about May 22, 1985, in the course of interstate and foreign commerce, complainant sold respondent one trucklot of potatoes consisting of 500 sacks of master 10# vv @ $5.04 per sack, 300 50# sacks of round whites @ $4.36 per sack, and 100 50# sacks of 2 3/4" round whites @ $6.28 per sack, for a total agreed delivered price of $4,456.00. The potatoes, which were shipped on May 25, 1985, were required to be U.S. No. 1. When the potatoes arrived at respondent's location on May 28, 1985, they were the subject of a federal inspection. The inspection certificate issued thereafter (F 090773) reflected the quality of the 10 pound lot of potatoes as follows:

"Mature, fairly clean, and fairly well to well shaped. Grade defects range from 10 to 33%, average 19%, mostly surface scab and old cuts." The condition of the whole trucklot of potatoes was reported as follows:

> 10 Lb. Lot: Generally firm. Most samples none, some 5% average 1% damage by flattened or depressed areas, some with underlying flesh being discolored.
> 50 Lb. Lot: Firm. Most samples 14 to 16%, many none, average 10% damage by flattened or depressed areas, some with underlying flesh being light grey to black, most samples 4 or 5%, many none, average 3% damage by dry type Fusarium Tuber Rot.
> Chef Lot: Firm. Range from 12 to 26%, average 19% damage by flattened or depressed areas, some with underlying flesh being light grey to black. Range 7 to 12%, average 10% damage by dry Fusarium Tuber Rot.
> Each Lot: Some potatoes show sprouts from barely visible to ½ inch in length not affecting grade. No soft rot.

It also was noted on the certificate that the 10 pound lot failed to grade U.S. No. 1 on account of grade defects, and that the other two lots, which were inspected for condition only, were not graded.

5. Subsequent to the federal inspection, the respondent rejected the lot of potatoes to the complainant, and the parties agreed that respondent would handle the potatoes on consignment.

6. On or about June 5, 1985, respondent dumped some potatoes at a cost of $500.00

7. On or about June 28, 1985, respondent accounted to the complainant for the May 22, 1985, shipment as follows:

SOLD:	125 101 lbs. Canadian Potatoes at 3.00	$ 375.00
	100 Chefs at 3.25	325.00
	75 50 lbs. Canadian Potatoes at 2.40	180.00
	295	$ 880.00
EXPENSES:	900 pieces handling charges and delivery at 1.25 per piece	1125.00
	Cost of dumping at 250 per container	500.00
	Labor and handling	125.00
	Inspection	61.00
	TOTAL CHARGES	$1811.32

605 Master bags were dumped in two yard containers.

8. On or about June 5, 1985, in the course of interstate and foreign commerce, complainant sold respondent one trucklot of potatoes consisting of 550 sacks master 10# vv @ $3.85 per sack and 350 50# sacks of round white @ $4.465 per sack, for a total agreed delivered price of $4,378.75. The potatoes, which also were shipped on June 5, 1985, were required to grade U.S. No. 1. After the potatoes arrived on June 6, 1985, they were the subject of a federal inspection. The certificate issued thereafter (F 090774) reflects that the quality of the potatoes was as follows: "Each lot: Mature, fairly clean and fairly well to well shaped. 10 lb lot: Grade defects range 12 to 21%, average [sic] 17% mostly surface scab, cuts and bruises. 50 lb lot: Grade defects range 17 to 26%, average 21%, mostly surface scab, cuts [sic] and bruises." The condition of the potatoes is reflected as follows:

> 10 lb. lot: Generally firm, most samples 1 to 10% some [sic] none, average 2% damage by flattened or depressed areas, some wich [sic] underlying flesh being discolored. Most samples 1 to 4%,many [sic]

none, average 1% damage by dry type Fusarium Tuber Rot. No soft rot.
50 lb. lot: Generally firm, range 1 to 7% average 3% damage by flattened depressed areas, some with underlying flesh being discolored. Most samples 1 to 3%, some none, average 2% damage by dry type Fusarium Tuber Rot.

Each lot failed to grade U.S. No. 1 on account of the grade defects.

9. On or about June 8, 1985, respondent dumped 1 container of potatoes at a cost of $150.00 plus a $150.00 dumping fee. On or about July 3, 1985, respondent reported to complainant that all of the potatoes shipped June 5, 1985, were dumped.

10. On or about June 6, 1985, in the course of interstate and foreign commerce, the complainant sold to respondent one trucklot of potatoes consisting of 600 5# sacks of round whites @ $5.625 per sack, 200 5# sacks of Russets @ $6.30 per sack, and 200 50# sacks of round whites @ $4,325 per sack, for a total agreed delivered price of $5,500.00. The potatoes, which were shipped on June 8, 1985, were required to grade U.S. No. 1. This trucklot of potatoes was inspected on arrival on June 11, 1985. The inspection certificate issued thereafter (F 090775) reflects the quality of the potatoes as follows: "50 lb and 5 lb Round White Lot: Mature, fairly clean and fairly well to well shaped. Grade defects range from 4% to 8%, average 5% mostly old cuts and bruises. 5 lb Russet Burbank Lot: Mature, clean and fairly well to well shaped.Grade [sic] defects average 3% mostly misshapen." The condition of the potatoes is reported as follows:

50 lb Round White Lot: Generally firm, Range 1 to 6% average 3% damage by flattened or depressed areas, many with underlying flesh being light grey to black. Range 1 to 3%, average 2% damage by dry type Fusarium Tuber Rot. Average 2% damage by moist type Fusarium Tuber Rot. Less than 1% soft rot.
5 lb Round White Lot: Generally firm. Range 4 to 14% average 10% damage by flattened or depressed area, many with underlying flesh flesh being light grey to black. Range 1 to 3%, average 2% damage by dry type Fusarium Tuber Rot. Less than ½ to 1% soft rot.
5 lb Russet Burbank lot: Firm. No soft rot.

The grade of the potatoes was reported as follows: "50 lb and 5 lb Round White Lot: Meets quality requirements but failes [sic] to grade U.S.No. [sic] 1, 2 inch minimum only account condition. 5 lb Russet Burbank Lot: U.S.No. [sic] 1, 2 inch minimum."

11. Subsequent to the federal inspection, the respondent rejected the trucklot of potatoes to the complainant. Thereafter, the parties agreed that the respondent would handle the potatoes on consignment. On or about June 25, 1985, the respondent dumped two containers of potatoes at a cost of $250.00 each.

12. On or about July 10, 1985, respondent accounted to the complainant for the June 6, 1985, shipment as follows:

SOLD	200 Russets @ $6.30/bg	TOTAL	$1,260.00
EXPENSES	Handling and Delivery @ $1.25/bg 800 bgs		1,000.00
	Dumping 2 containers @ $250.00/container		500.00
	Labor and Handling		125.00
	Inspection		61.32
		TOTAL	($ 426.32)

Respondent requested that complainant pay it the $426.32 deficit.

13. On or about June 11, 1985, in the course of interstate and foreign commerce, the complainant sold to respondent a trucklot of potatoes consisting of the following: 600 10# sacks of round white @ $5.12 per sack, 250 50# sacks of round whites @ $4,465 per sack, and 1000 10# bags of Russets @ 97¢ per sack, for a total agreed delivered price of $5,158.25. The potatoes which were required to grade U.S. No. 1, were shipped on June 15, 1985. The trucklot of potatoes was the subject of a federal inspection upon arrival on June 17, 1985, and the inspection certificate issued thereafter (F 090780) reflected the quality of the potatoes as follows: "Each lot: Mature, fairly clean and fairly well to well shaped. 10 lb lot: Grade defects range 1 to 9%, average 5% mostly cuts and bruises. 5/10 lb lot: Grade defects range 4 to 16%, average 10% mostly cuts and bruises. 50 lb lot: Grade defects range 6 to 10%, average 7% mostly cuts and bruises and growth cracks." The condition of the potatoes is reported as follows:

> 10 lb lot: Firm. In most samples 3 to 5%, some none average 3% Fusarium Tuber Rot (moist type). In most samples none, some 4%, average 1% damage by Fusarium Tuber Rot (Dry type). In most samples, 1 to 6%, some none, average 2% damage by flattened or depressed areas. No soft rot.
> 5/10 lb lot: Firm, from 3 to 5%, average 4% damage by dry type Fusarium Tuber Rot. In most samples 1 to 5%, many none, average 2% damage by flattened or depressed areas. Many potatoes show sprouts from 1/8 to 3/4 inches not affecting grade. No soft rot.
> 50 lb lot: Firm. From 3 to 4%, average 4% damage by flattened or depressed areas. From 6 to 25%, average 15% sprouts over 3/4 inch in length. No soft rot.

The grade of the potatoes is reported as follows: "10 lb lot: Meets quality requirements but fails to grade U.S. No. 1 account condition. 5/10 lb lot and 50 lb lot: Fails to grade U.S. No. 1 account grade defects."

14. Subsequent to the federal inspection, the parties agreed that the respondent would handle the trucklot of potatoes on consignment. On or about June 25, 1985, the respondent dumped two containers of potatoes at a cost of $600.00.

15. On or about July 3, 1985, respondent reported to complainant that it had dumped all the potatoes in the June 15, 1985, shipment, and requested payment of the dumping costs ($600.00) and inspection fees ($61.32).

16. On or about June 14, 1985, in the course of interstate and foreign commerce, the complainant sold to respondent one trucklot of potatoes consisting of 175 5# sacks of Russets @ $6.225 per sack, 100 50# sacks of Russets @ $9.625 per sack, 100 10# vv sacks of round whites @ $5.12, and 500 5# sacks of round whites @ $5.525 per sack, for a total agreed delivered price of $5,838.38. The potatoes, which were required to grade U.S. No. 1, were shipped on June 15, 1985. Upon arrival, on June 17, 1985, the trucklot of potatoes was the subject of two federal inspections. On the certificate issued thereafter (F 090783) which relates to the round whites it was reported that they failed to grade U.S. No. 1 either on account of grade defects or on account of condition defects.[1] The quality of the potatoes is reported as follows:

> Quality Pak & Mountain Valley [10/5#] lots: Mature, clean [sic] & fairly well to well shaped.

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[1]This certificate corrects certificate No. 090778.

Beechwood Canam lot: [5/10#] lot: Mature, fairly [sic] clean and fairly well to well shaped.
Quality Pak [10/5#] lot: Grade [sic] defects range from 4 to 10%, average 7% mostly suburn, cuts [sic] & bruises. Mountain Valley [10/5#] lot: Grade defects range from 6 to 10%, average 9% mostly sunburn, cuts [sic] & bruises. Beechwood Canam lot: Grade defects range from 3 to 6%, average 4% mostly misshapen, cuts & bruises.

The certificate reflects the condition of the potatoes as follows:

Quality Pak [10/5#] lot: Generally firm, range from 5 to 13%, average 8% damage by flattened or depressed areas. Average 1% damage by dry type Fusarium Tuber Rot. Less than ½ of 1% Soft Rot.
Mountain Valley [10/5#] lot: Generally [sic] firm. Range from 8 to 20%, average 14% flattened or depressed areas, most with underlying flesh being light grey to black. In most samples 5 to 8%, many none, average 4% damage by dry type Fusarium Tuber Rot. Less than ½ of 1% Soft Rot.
Beechwood Canam lot: Firm, range from 1 to 8% average 5% damage by flattened or depressed areas, some with underlying flesh being light grey to black. No soft Rot.

The other certificate issued thereafter (F 090779) covers the Russets on the trucklot, and reflects that the 5# lot of Russets failed to grade U.S. No. 1 on account of condition, and that the 50# lot of Russets was inspected for condition only and was not graded.[2] The quality of the 10/5# lot was reported as follows: "Mature, clean and fairly well to well shaped. Grade defects range 3 to 9%, average 5%, mostly cuts and bruises and growth cracks." The condition of the 10/5# lots if reported as follows: "Firm range from 1 to 4%, average 2% damage by flattened or depressed areas. In most samples none, many 8%, average 2% damage by dry Fusarium Tuber Rot. No soft Rot." The condition of the 50# lot is reported as follows: "Firm. Range from 6 to 9%, average 8% damage by dry type Fusarium Tuber Rot. Range from 1 to 3%, average 2% damage by moist type Fusarium Tuber Rot. No soft rot." Subsequent to the inspections, the respondent rejected the trucklot of potatoes to complainant, and the parties agreed that respondent would handle the potatoes on consignment. On June 24, 1985, 206 sacks out of the total 875 shipped were inspected.[3] On the certificate issued thereafter (F 090781) the inspector noted that he witnessed the potatoes identified therein "being loaded into trash container [sic]." Dumping the potatoes cost the respondent $300.00. The record does not disclose how respondent, which failed to account for them, disposed of the remaining 669 sacks of potatoes.

17. A formal complaint was filed on February 20, 1986, which was within nine months after the causes of action herein accrued.

Conclusions

The instant case involves five trucklots of potatoes which the complainant sold to the respondent. Each of the trucklots was rejected for good cause after being subject to federal inspection, and the parties agreed that the

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[2]We take official notice of this certificate which was not part of the record. *See* 7 C.F.R. § 47.25(f).

[3]17 sacks of Toner Farm Lot 5# sacks, which were not part of the subject trucklot, were also dumped. The potatoes from the subject trucklot which were included in the dumping were 183 5# sacks of round whites and 23 50# sacks of Russets.

respondent was to handle each trucklot for the complainant's account. For each of its causes of action herein, complainant claims that respondent failed to account truly and correctly for each of the trucklots.

The evidence presented establishes that complainant was required, by the terms of its original contracts with respondent, to ship respondent U.S. No. 1 potatoes. The inspection reports referred to in the findings of fact, above, makes it clear that complainant failed to do so.[4] However, this failure does not obviate the necessity that the respondent, as a consignee as a result of the parties' subsequent agreement, "exercise reasonable care and diligence in disposing of the [potatoes] promptly and in a fair and reasonable manner." 7 C.F.R. § 46.29(a). The evidence does not support a conclusion that it did so. That is, the results of the federal inspections do not warrant a conclusion that the respondent's actions in failing to make a prompt and proper sale of the potatoes, and in dumping the potatoes as quickly, and in such large numbers, was proper. Accordingly, it is concluded that respondent violated section 2(4) of the Act which provides that it is unlawful for a commission merchant "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any" transaction involving perishable agricultural commodities. *J.T. Badger, Sr. v. W.H. and H.B. Thompson, et al.*, 1 Agric. Dec. 257 (1942).

Having failed to handle the potatoes as required by the Act, and the regulations, respondent is liable to complainant for the market value of the potatoes at Deerpark, New York, at the time they could have been disposed of by respondent. *Klein v. Ruark*, 15 Agric. Dec. 510 (1956). The burden of proving, by a preponderance of the evidence, the potatoes' market value, *i.e.*, not only the market price but also the quantity of marketable potatoes, falls on the complainant. *L. Tom & Son v. Gerber*, 20 Agric. Dec. 790 (1961). While in the absence of any other evidence, we can assume that the parties' agreed contract price represents the market price for the potatoes, the complainant has failed to offer any evidence by which we can form a conclusion as to the number of potatoes, from each of the five subject lots, which actually were marketable. As under the circumstances described above the respondent should have been able to make a prompt and proper resale of a substantial portion of the potatoes, although clearly not all due to the largepercentage of defects found by the federal inspectors, the consequential damage to other portions of the lots, and the potatoes lost during repacking, we find it reasonable, in the circumstances present here, to estimate the market value of the potatoes by deducting the value of 150% of the damaged potatoes as found by the federal inspectors from the contract price specified

[4]Indeed, it would appear that complainant shipped the respondent culls left over from the 1984 shipping season.

in the parties' original agreement, and allowing respondent a reasonable handling charge of $1.25 per sack.[5]

Applying the above-noted formula to the May 22, 1985, transaction, we find that respondent is obligated to complainant in the amount of $1,883.56 ($3,008.56 - $1,125.00). With regard to the June 5, 1985, transaction, respondent is obligated to complainant in the amount of $674.48 ($1,799.48 - $1,125.00). For the June 6, 1985, transaction, respondent is indebted to complainant in the amount of $3,112.10 ($4,362.10 - $1,250.00). Applying the above-noted formula to the June 11, 1985, transaction, we find that respondent is obligated to the complainant in the amount of $1,513.08 ($3,825.58 - $2,312.50). With regard to the June 14, 1985, transaction, respondent is obligated to complainant in the amount of $3,297.68 ($4,516.43 - $1,218.75).

In view of the above, respondent's counterclaim should be dismissed. Furthermore, we find that respondent is obligated to complainant in the total amount of $10,480.90 ($1,883.56 + $674.48 + $3,112.10 + $1,513.08 + $3,297.68). Respondent's failure to pay complainant this amount is a violation of section 2 of the Act for which reparation plus interest should be awarded.

Order

Within thirty days from the date of this order, the respondent shall pay to complainant, as reparation, $10,480.90 with interest thereon, at the rate of 13% per annum from August 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

MERRILL FARMS v. AGRIBUSINESS PRODUCERS, INC., a/t/a APGRO.
PACA Docket No. R 88-116.
Order issued May 2, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that settlement had been reached, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

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[5]It should be noted that the factual situation in this case is unlike that in a case where a buyer has the burden of proving damages and fails to do so. In the latter cases we have held that we would estimate the unmarketable portion of the lot by deducting the precise amount of the damages found by the federal inspector. *See Cal/Mex Distributors v. Favco, Inc.*, 45 Agric. Dec. 1630 (1986). The ruling in the instant case is limited to the factual circumstances described here, (*i.e.*, the seller, who is contractually bound to ship U.S. No. 1 produce, knowingly fails to do so, but the buyer, who timely rejects and agrees to handle the produce on consignment, fails to truly and correctly account), and should not be considered as precedent in any other type case. *Cf. Meyer Tomatoes v. Hardcastle Produce Co.*, 40 Agric. Dec. 1172 (1981), in which, as in the instant case, subsequent to the arrival of the lot of produce in question, the parties agreed to rescind the purchase and sale agreement and the seller agreed that the buyer could handle the lot on consignment, but where, when the buyer/consignee failed to truly and correctly account, the seller/consignor was awarded the full amount of the original invoice price because there had been no federal inspection and there was no evidence that the produce was "abnormally deteriorated."

NORTHWEST ONION CO. v. SPADA DISTRIBUTING CO., INC.
PACA Docket No. R 88-118.
Order issued May 2, 1988.

Order issued by Donald A Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

In its answer to the complaint, respondent admitted the material allegations of the complaint, including indebtedness to complainant in the amount of $29,263.75.

Accordingly, respondent was ordered to pay complainant, as reparation, $29,263.75, with interest thereon at the rate of 13 percent per annum from April 1, 1987, until paid.

SHURFINE-CENTRAL CORPORATION v. LOI BRONX TERMINAL CORP.
PACA Docket No. R 88-94.
Order issued May 4, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL
(Summarized)

Complainant notified the Department that settlement had been reached, and authorized dismissal of its complaint filed herein.

Accordingly, the complaint was dismissed.

GERALD McAVOY v. A.E. ALBERT & SONS, INC.
PACA Docket No. R 88-135.
Order issued May 4, 1988.

Order issued by Donald A. Campbell, Judicial Officer.

REPARATION ORDER
(Summarized)

In its answer to the complaint, respondent admitted the material allegations of the complaint, including indebtedness to complainant in the amount of $4,822.50.

Accordingly, respondent was ordered to pay complainant, as reparation, $4,822.50, with interest thereon at the rate of 13 percent per annum from May 1, 1987, until paid.

FRANK MINARDO, INC. v. ROBERT W. CASTO, d/b/a PRIMA CITRUS & FRUIT EXCHANGE.
PACA Docket No. 2-7237.
Decision issued May 4, 1988.

Jory M. Hochberg, Presiding Officer.
Thomas Oliveri, Newport Beach, California, for complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $6,952.20, with interest thereon at the rate of 13% per annum from October 1, 1985, until paid.

Copies of this order shall be served upon the parties.

LOUIS KALECK d/b/a KALECK DISTRIBUTING COMPANY v. PAUL J. MACRIE, INC.
PACA Docket No. 2-7371.
Decision issued May 4, 1988.

Andrew Y. Stanton, Presiding Officer.
B.G. Hall, McAllen, Texas, for complainant.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $429.87, with interest thereon at the rate of 13 percent per annum from January 1, 1986, until paid.

Copies of this order shall be served upon the parties.

METRO PRODUCE, INC. v. JAMES BOGGIO.
PACA Docket No. R 88-71.
Order issued May 4, 1988.

Andrew Y. Stanton, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Order issued by Donald A. Campbell, Judicial Officer.

ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. 499a *et seq.*). A timely complaint was filed in which complainant seeks reparation against respondent in the amount of $4,904.00 in connection with a transaction involving the shipment of fresh produce in interstate commerce.

A copy of the formal complaint was served on respondent. Respondent filed an answer, admitting liability for $4,696.85, but alleging that the $207.15 difference between the admitted amount and the amount alleged in the complaint had been paid. On February 24, 1988, an order was issued,

awarding reparation to complainant for $4,696.85 plus interest. Complainant was given 20 days from its receipt of the order to show cause why the $207.15 ostensibly still in dispute should not be considered paid, and its complaint for that amount dismissed. Complainant has failed to respond.

Accordingly, the complaint for the $207.15 in dispute is hereby dismissed.

Copies of this order shall be served upon the parties.

SOURCE PRODUCE DISTRIBUTING CO. v. ANTHONY J. D'ACQUISTO d/b/a TROPIC BANANA CO.
PACA Docket No. 2-7039.
Decision issued May 4, 1988.

John J. Casey, Presiding Officer.
LeRoy W. Gudgeon, Northfield, Illinois, for complainant.
Charles J. Rainey, Milwaukee, Wisconsin, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days of the date of this order, respondent shall pay to complainant as reparation $14,142.54, with interest thereon at the rate of 13% per annum from the date of this order until paid.

Copies of this order shall be served on the parties.

CAL/MEX DISTRIBUTORS, INC. v. TOM LANGE COMPANY, INC.
PACA Docket No. 2-6979.
Order issued May 9, 1988.

ORDER OF DISMISSAL

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the Department has been advised by the parties that the matters in dispute between them have been settled. Accordingly, the complaint and counterclaim are dismissed, with prejudice.

Copies of this order shall be served upon the parties.

FRUIT MARKETING, INC. v. C.L. FAIN CO., INC., and/or M.E. WILLIAMS & CO., INC.
PACA Docket No. 2-7208.
Decision issued May 9, 1988.

George D. Becker, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order respondent, C.L. Fain Co., Inc., shall pay to complainant $5,860.30.

The complaint against M.E. Williams & Co., Inc., is dismissed.

Copies of this order shall be served on the parties.

SUNRICH, INCORPORATED v. PALAZOLA PRODUCE CO., INC.
PACA Docket No. 2-7297.
Decision issued May 9, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant $1,940.00, as reparation, plus interest at the rate of 13% per annum from November 1, 1985, until paid.

Copies of this order shall be served upon the parties.

JOE PHILLIPS, INC. v. DANA R. JOHNSON d/b/a U.S. FOOD MARKETING.
PACA Docket No. 2-7313.
Decision issued May 9, 1989.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
G. Wilson Martin, Jr., Mocksville, North Carolina, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(SUMMARIZED)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $4,343.11 plus interest at the rate of 13% per annum from August 1, 1985, until paid.

The counterclaim is dismissed.

Copies of this order shall be served upon the parties.

VALLEY BROKERAGE, INC. v. DELTA PACKING COMPANY OF LOD INC.
PACA Docket No. 2-7298.
Decision issued May 18, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay t complainant, as reparation, $2,837.75 plus interest at the rate of 13% pe annum from August 1, 1985, until paid.

Copies of this order shall be served upon the parties.

ARTHUR B. TANNER v. ROGER HARLOFF PACKING, INC.
PACA Docket No. 2-7098.
Decision issued May 20, 1988.

George S. Whitten, Presiding Officer.
Stephen P. McCarron, Silver Spring, Maryland, for complainant.
Calelo J. Gimeo, Bradenton, Florida for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within thirty days from the date of this order, respondent shall pay to complainant, as reparation, $49,311.50, with interest thereon at the rate of 13% per annum from February 1, 1985, until paid.

Within thirty days from the date of this order, respondent shall also pay to complainant, as additional reparation, fees and expenses in the amount of $5,714.99, with interest thereon at the rate of 13% per annum from the date of this order until paid.

Copies of this order shall be served upon the parties.

MYCO ENTERPRISES v. JERRY PEPELIS d/b/a JERRY PEPELIS PACKING CO.
PACA Docket No. 2-7296.
Decision issued May 20, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Cleveland Stockton, Modesto, California, for respondent.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

The complaint is dismissed.

Copies of this order shall be served upon the parties.

KARAL F. KUNDERT AND STEPHEN J. MATYCH d/b/a COAST-TO-COAST PRODUCE CO. v. CALAVO GROWERS OF CALIFORNIA.
PACA Docket No. 2-7306.
Decision issued May 20, 1988.

Edward M. Silverstein, Presiding Officer.
Complainant, pro se.
Respondent, pro se.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER
(Summarized)

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, $679.20 plus interest thereon at the rate of 13% per annum from February 1, 1986, until paid.

Copies of this order shall be served upon the parties.

L&L PRODUCE, INC. v. JOSE HASAKIAN d/b/a EL MORRO PRODUCE.
PACA Docket No. R 88-139.
Order issued May 20, 1988.

REPARATION ORDER
(Summarized)

In its answer to the complaint, respondent admitted the material allegations of the complaint, including indebtedness to complainant in the amount of $10,506.75.

Accordingly, respondent was ordered to pay complainant, as reparation, $10,506.75, with interest thereon at the rate of 13 percent per annum from December 1, 1986, until paid.

REPARATION DEFAULT ORDERS ISSUED BY DONALD A. CAMPBELL, JUDICIAL OFFICER

(Summarized)

ACTION PRODUCE v. L. R. MORRIS PRODUCE EXCHANGE INC.
PACA Docket No. RD 88-248.
Default Order issued May 12, 1988.

Respondent was ordered to pay complainant, as reparation, $9,430.50, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

ANTHONY BROKERAGE INC. v. CHAPMAN PRODUCE CO. INC.
PACA Docket No. RD 88-252.
Default Order issued May 17, 1988.

Respondent was ordered to pay complainant, as reparation, $3,742.50, plus 13 percent interest per annum thereon from January 1, 1987, until paid.

BARRA PRODUCE-BAY TREE PLANTATION v. VIC MAHNS INC.
PACA Docket No. RD 88-246.
Default Order issued May 11, 1988.

Respondent was ordered to pay complainant, as reparation, $2,660.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

B G HARMON FRUIT CO. INC. v. STANLEY SUSSMAN INC. a/t/a ANGELO DIGIACOMO.
PACA Docket No. RD 88-260.
Default Order issued May 18, 1988.

Respondent was ordered to pay complainant, as reparation, $1,366.20, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

BIG "H" SALES INC. v. SPADA DISTRIBUTING CO. INC.
PACA Docket No. RD 88-262.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $8,666.00, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

CAMERON BROS. CONST. CO. INC. a/t/a SUN VALLEY RANCH v. JOE PINTO & SON INC.
PACA Docket No. RD 88-233.
Default Order issued May 13, 1988.

Respondent was ordered to pay complainant, as reparation, $9,851.70, plus 13 percent interest per annum thereon from April 1, 1986, until paid.

CARLTON FRUIT CO. v. RALPH D. HUGHES INC.
PACA Docket No. RD 88-251.
Default Order issued May 17, 1988.

Respondent was ordered to pay complainant, as reparation, $33,813.20, plus 13 percent interest per annum thereon from March 1, 1987, until paid.

ALLEN R. FORD AND DONALD E. PRESTON d/b/a MOUNTAIN GROWN VEGETABLES v. VIC MAHNS INC.
PACA Docket No. RD 88-247.
Default Order issued May 12, 1988.

Respondent was ordered to pay complainant, as reparation, $19,734.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

FRESH & WILD INC. v. CHINOOK FOODS & SERVICE.
PACA Docket No. RD 88-259.
Default Order issued May 18, 1988.

Respondent was ordered to pay complainant, as reparation, $2,357.13, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

GENERAL POTATO & ONION INC. v. MITSUGU TANITA d/b/a MITS TANITA SALES.
PACA Docket No. RD 88-234.
Default Order issued May 13, 1988.

Respondent was ordered to pay complainant, as reparation, $2,740.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

H & L FARM INC. v. McBRAYER POTATO CHIP CO. INC.
PACA Docket No. RD 88-261.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $3,588.95, plus 13 percent interest per annum thereon from January 1, 1988, until paid.

H. R. HINDLE & CO. INC. v. CALIFORNIA CUSTOM CUTS INC.
PACA Docket No. RD 88-200.
Default Order issued May 13, 1988.

Respondent was ordered to pay complainant, as reparation, $1,251.00, plus 13 percent interest per annum thereon from February 1, 1987, until paid.

H.R. HINDLE & CO., INC. v. CALIFORNIA CUSTOM CUTS, INC.
PACA Docket No. RD 88-200.
Order issued May 13, 1988.

ORDER DENYING MOTION TO
REOPEN AFTER DEFAULT

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*), the respondent failed to file a timely answer. However, prior to the issuance of a Default Order, respondent submitted a proposed answer, received by the Department on April 12, 1988. Respondent was sent a letter dated April 15, 1988, giving it an opportunity to submit a motion to reopen after default. On April 25, 1988, respondent filed a motion to reopen the proceeding after default and allow the filing of its proposed answer pursuant to section 47.25 of the Rules of Practice (7 C.F.R. § 47.25(e)).

Respondent's answer was due to be filed no later than February 15, 1988. In the motion to reopen, respondent's president, Kevin E. Spry, stated that he was out of the office until February 8, 1988. However, he still had a week to file a timely answer or request an extension of time, but failed to submit a proposed answer until April 12, 1988, approximately two months after it was due. Under these circumstances, it is concluded that respondent has failed to present a good reason why the default should be reopened, pursuant to 7 C.F.R. § 47.25(e).

Accordingly, respondent's motion to reopen is denied.

Copies of this order shall be served upon the parties.

INN FOODS INC. v. C. E. RHODES ENTERPRISES INC.
PACA Docket No. RD 88-244.
Default Order issued May 11, 1988.

Respondent was ordered to pay complainant, as reparation, $7,510.98, plus 13 percent interest per annum thereon from February 1, 1987, until paid.

J-B DISTRIBUTING CO. v. ATLANTIC PRODUCE INC.
PACA Docket No. RD 88-255.
Default Order issued May 17, 1988.

Respondent was ordered to pay complainant, as reparation, $12,274.98, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

J. R. NORTON COMPANY v. MENDENHALL DISTRIBUTING CO. INC.
PACA Docket No. RD 88-241.
Default Order issued May 10, 1988.

Respondent was ordered to pay complainant, as reparation, $13,215.60, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

JOE PHILLIPS INC. v. INTERNATIONAL PRODUCE (USA) INC.
PACA Docket No. RD 88-265.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $39,968.26, plus 13 percent interest per annum thereon from November 1, 1987, until paid.

JUNGLE KING INC. v. DAVID L. WOOD d/b/a WOOD PRODUCE CO.
PACA Docket No. RD 88-242.
Default Order issued May 11, 1988.

Respondent was ordered to pay complainant, as reparation, $5,617.50, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

KORNBLUM & CO. INC. v. J. PANDEL & SON INC.
PACA Docket No. RD 88-238.
Default Order issued May 10, 1988.

Respondent was ordered to pay complainant, as reparation, $8,217.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

L & L PRODUCE INC. v. CARLOS LEON d/b/a FIESTA LATINA SPECIALTY FOOD PRODUCTS.
PACA Docket No. RD 88-266.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $3,534.50, plus 13 percent interest per annum thereon from October 1, 1986, until paid.

MANN PACKING CO. INC. v. ATLANTIC PRODUCE INC.
PACA Docket No. RD 88-257.
Default Order issued May 18, 1988.

Respondent was ordered to pay complainant, as reparation, $8,028.10, plus 13 percent interest per annum thereon from October 1, 1987, until paid.

METRO PRODUCE INC. v. IMAD NAEMI d/b/a MORNING STAR PRODUCE.
PACA Docket No. RD 88-254.
Default Order issued May 17, 1988.

Respondent was ordered to pay complainant, as reparation, $12,560.50, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

M. J. FARMS INC. v. ORIENT PRODUCE AND FOODS CO.
PACA Docket No. RD 88-236.
Default Order issued May 13, 1988.

Respondent was ordered to pay complainant, as reparation, $2,800.00, plus 13 percent interest per annum thereon from December 1, 1986, until paid.

MURAKAMI FARMS INC. v. ROBERT H. GUTIERREZ d/b/a GUTIERREZ DISTRIBUTING.
PACA Docket No. RD 88-253.
Default Order issued May 17, 1988.

Respondent was ordered to pay complainant, as reparation, $6,000.00, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

NICK DELIS CO. INC. v. U. S. FOOD MARKETING INC.
PACA Docket No. RD 88-263.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $1,637.50, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

PACIFIC FRESH MARKETING INC. v. JAMES W. BUCHANAN d/b/a J. BUCHANAN CO.
PACA Docket No. RD 88-258.
Default Order issued May 18, 1988.

Respondent was ordered to pay complainant, as reparation, $3,810.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

PELLERITO FOODS INC. v. PETER J. TOCCO d/b/a PREMIER PRODUCE CO.
PACA Docket No. RD 88-250.
Default Order issued May 12, 1988.

Respondent was ordered to pay complainant, as reparation, $1,979.85, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

R. A. RASMUSSEN & SONS INC. v. DAVID PRELL.
PACA Docket No. RD 88-240.
Default Order issued May 10, 1988.

Respondent was ordered to pay complainant, as reparation, $8,240.00, plus 13 percent interest per annum thereon from November 1, 1986, until paid.

RICHLAND SALES CO. v. SELECT PRODUCE INC.
PACA Docket No. RD 88-239.
Default Order issued May 10, 1988.

Respondent was ordered to pay complainant, as reparation, $999.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

ROGER HARLOFF PACKING INC. v. S. W. FLORIDA SALES CORP.
PACA Docket No. RD 88-243.
Default Order issued May 11, 1988.

Respondent was ordered to pay complainant, as reparation, $19,024.00, plus 13 percent interest per annum thereon from July 1, 1987, until paid.

SCOTT FINKS CO. INC. v. LOUIS DESPAUX AND CARL G. PORCHE JR. d/b/a LUCKY US.
PACA Docket No. RD 88-270.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $1,355.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

SENEVA J. BERRY d/b/a SUNNY FARMS v. SAGUARO POTATO CHIP CO. INC.
PACA Docket No. RD 88-231.
Default Order issued May 12, 1988.

Respondent was ordered to pay complainant, as reparation, $4,808.00, plus 13 percent interest per annum thereon from August 1, 1987, until paid.

STANDARD FRUIT & VEGETABLE CO. INC. v. FRESH HARVEST MARKET INC.
PACA Docket No. RD 88-237.
Default Order issued May 10, 1988.

Respondent was ordered to pay complainant, as reparation, $42,310.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

TALLEY FARMS INC. v. ATLANTIC PRODUCE INC.
PACA Docket No. RD 88-256.
Default Order issued May 18, 1988.

Respondent was ordered to pay complainant, as reparation, $1,943.40, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

TOP NOTCH PRODUCE INC. v. U. S. FOOD MARKETING INC.
PACA Docket No. RD 88-245.
Default Order issued May 11, 1988.

Respondent was ordered to pay complainant, as reparation, $6,275.25, plus 13 percent interest per annum thereon from June 1, 1987, until paid.

UMINA BROS. INC. v. CHAPMAN PRODUCE CO. INC. Formerly: EDWARDS & PRODUCE CO. INC.
PACA Docket No. RD 88-267.
Default Order issued May 26, 1988.

Respondent was ordered to pay complainant, as reparation, $3,767.50, plus 13 percent interest per annum thereon from April 1, 1987, until paid.

VAL-MEX FRUIT COMPANY INC. v. GERONIMO'S INC. a/t/a GERONIMO'S MEXICAN PRODUCE.
PACA Docket No. RD 88-232.
Default Order issued May 13, 1988.

Respondent was ordered to pay complainant, as reparation, $17,398.00, plus 13 percent interest per annum thereon from September 1, 1987, until paid.

WAYNE LESSARD FARMS INC. v. McBRAYER POTATO CHIP CO. INC.
PACA Docket No. RD 88-249.
Default Order issued May 12, 1988.

Respondent was ordered to pay complainant, as reparation, $3,486.56, plus 13 percent interest per annum thereon from December 1, 1987, until paid.

In re: MODESTO ALVAREZ ALVAREZ.
PQ Docket No. 332.
Decision and Order filed March 17, 1988.

Importation of ham from Mexico--Failure to file answer.

Joseph Pembroke, for complainant.
Respondent, pro se.
Decision and Order issued by Edward H. McGrail, Administrative Law Judge.

DECISION AND ORDER

This is an administrative proceeding for the assessment of a civil penalty for a violation of the regulations governing the importation of meat into the United States (9 C.F.R. 94.9), hereinafter referred to as the regulations, in accordance with the Rules of Practice in 7 C.F.R. § § 1.130 *et seq.* and 380.1 *et seq.* and 9 C.F.R. § 93.1 *et seq.*

This proceeding was instituted by a Complaint filed on May 8, 1987, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The Complaint alleged that on or about October 31, 1986, the respondent imported from Mexico into the United States one hundred and seventy-one pounds of ham, in violation of section 94.9 of the regulations (9 C.F.R. 94.9), because the ham was not properly rendered, prepared or canned as to allow entry.

Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136) applicable to this proceeding, respondent was informed in the complaint and the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer either denying, admitting, or explaining the allegations in the complaint and requesting an oral hearing would constitute an admission of such allegations and waiver of such hearing. More than twenty (20) days have elapsed since respondent was served with the complaint in question. Respondent has failed to file an answer. This failure to file an answer is an admission of the allegations contained in the Complaint and constitutes a waiver of hearing (7 C.F.R. § 1.139).

Accordingly, the material allegations alleged in the Complaint are adopted and set forth herein as the Findings of Fact, and this Decision is issued pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139).

Findings of Fact

1. Modesto Alvarez Alvarez, herein referred to as the respondent, is an individual whose address is 9111 Long Beach Boulevard, South Gate, California 90280.

2. On or about October 31, 1986, the respondent imported from Mexico, into the United States, one hundred and seventy one pounds (171 lbs.) of ham in violation of section 94.9 of the regulations (9 C.F.R. § 94.9), because ham is prohibited entry in accordance with the regulations.

Conclusions

By reason of the facts contained in the Findings of Fact above, the respondent has violated section 94.9 of the regulations (9 C.F.R. § 94.9).

Therefore, the following Order is issued.

Order

The respondent, is hereby assessed a civil penalty of five hundred dollars ($500.00). This penalty shall be payable to the "Treasure of the United States" by certified check or money order, and shall be forwarded to U.S. Department of Agriculture, APHIS Field Servicing Office, Accounting Section, Butler Square West, 5th Floor, 100 North Sixth Street, Minneapolis, Minnesota 55403, within thirty (30) days from the effective date of this order. This order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon the respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 18, 1988.--Editor.]

In re: ROY LEON and COMPANY, INC.
PQ Docket No. 243.
Dismissal filed May 17, 1988.

Gabrielle Siman, for complainant.
Respondent, pro se.
Dismissal issued by Victor W. Palmer, Chief Administrative Law Judge.

DISMISSAL OF COMPLAINT

Upon the motion of complainant, the complaint herein is hereby dismissed.

In re: JOSE A. CASTANEDA.
PQ Docket No. 309.
Decision and Order filed March 28, 1988.

Importation of avocado from Mexico without permit--Failure to respond to material allegations.

Lori Monfort, for complainant.
Respondent, pro se.
Decision and Order issued by Dorothea A. Baker, Administrative Law Judge.

DECISION AND ORDER

This proceeding was instituted under the Plant Quarantine Act of August 20, 1912, as amended (Act) (7 U.S.C. § § 151-164a and 167) by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleges that respondent violated section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)) issued under the Act. A copy of the complaint and the rules of practice governing proceedings under the Act were served by certified mail on respondent by the Hearing Clerk on February 24, 1987.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after receipt of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to

request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent filed a timely answer in which he failed to deny or otherwise respond to the material allegations in the complaint.

Respondent's failure to deny or otherwise respond to the material allegations in the complaint constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Jose A. Castaneda is an individual whose mailing address is 2108 Date Palm, McAllen, Texas 78501.

2. On or about April 29, 1985, respondent imported from Mexico one avocado in violation of section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)) because the avocado was not imported under permit, as required.

Conclusions

Respondent failed to deny or otherwise respond to the allegations in the complaint. By reason of the Findings of Fact, respondent has violated the Act and the regulations issued under the Act. Therefore, the following Order is issued.

Order

Jose A. Castaneda is hereby assessed a civil penalty of two hundred fifty dollars ($250.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty days (30) from the effective date of this Order to:

USDA, APHIS, Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North Sixth Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 309.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

[This Decision and Order became final May 25, 1988.--Editor.]

In re: REEFER EXPRESS LINES PFY, LTD.
PQ Docket No. 342.
Decision and Order filed May 27, 1988.

Improper handing of garbage--Failure to file answer.

The Judicial Officer affirmed Chief Judge Palmer's order assessing a civil penalty of $750 against respondent under the Act of February 2, 1903, as amended, and the Federal Plant Pest Act, as amended, on the basis of *In re Kaplinsky*.

Lori Monfort, for complainant.
Jack Greenbaum, New York, New York, for respondent.
Initial decision issued by Victor W. Palmer, Chief Administrative Law Judge.
Decision and Order issued by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

This is an appeal by respondent from an initial Decision and Order by an Administrative Law Judge (attached as Appendix A) under the Act of February 2, 1903, as amended (21 U.S.C. § 111), and the Federal Plant Pest Act, as amended (7 U.S.C. § 150aa *et seq.*). The case is governed by the principles set forth in *In re Kaplinsky*, 47 Agric. Dec. ____ (Mar. 30, 1988), attached as Appendix B. Accordingly, the following order (which is the order that must be complied with, rather than the ALJ's order) should be issued in this case.

Order

Respondent is hereby assessed a civil penalty of $750, which shall be payable to the "Treasurer of the United States" by certified check or money order, which shall be forwarded to:

United States Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within 30 days after service of this order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 342.

Appendix A

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P.Q. Docket No. 342
	)	
Reefer Express Lines Pfy, Ltd.,	)	
	)	
Respondent	)	Default Decision and Order

This proceeding was instituted under the Act of February 2, 1903, as amended (21 U.S.C. § 111) and the Federal Plant Pest Act, as amended (7

U.S.C. § 150aa *et seq.*), the Acts, by a complaint issued by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (USDA). The complaint alleged that respondent violated regulations (7 C.F.R. § 330.400 and 9 C.F.R. § 94.5) issued under the Acts. A copy of the complaint and the rules of practice governing proceedings under the Acts were served by certified mail on respondent by the Hearing Clerk for USDA on September 17, 1987.

Respondent was informed in the complaint and in the letter of service that an answer should be filed with the Hearing Clerk within twenty (20) days after receipt of the complaint, that failure to deny, otherwise respond or plead specifically to any allegation in the complaint would constitute an admission of such allegation, and that failure to file an answer within the prescribed time would constitute an admission of the allegations in the complaint and waiver of hearing. The letter of service also advised respondent that failure to request an oral hearing within the time for filing an answer would constitute a waiver of an oral hearing. Respondent has failed to respond in any manner to allegations in the complaint and has failed to request an oral hearing.

Respondent's failure to file an answer within the time prescribed by section 1.136(a) of the rules of practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the rules of practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the rules of practice (7 C.F.R. § 1.139). Because no basis for a hearing exists, the material allegations of fact in the complaint are adopted and set forth as the Findings of Fact.

Findings of Fact

1. Reefer Express Lines Pfy, Ltd., respondent, is a company whose address is Charter Office, 5 Becker Farm Road, Roseland, New Jersey 07068.

2. Respondent's agent for service of process is Eller and Company, Inc., located at 31 West Congress Street, Suite 303, Savannah, Georgia 31412.

3. On or about December 8, 1986, respondent failed to contain garbage in tight, leak-proof covered receptacles and placed garbage receptacles outside the guard rail during storage on board on its vessel, the M/V Cyprus Starland, while the vessel was within the territory of the United States in violation of section 94.5 of the regulations (9 C.F.R. § 94.5) and section 330.400(b)(1) of the regulations (7 C.F.R. § 330.400(b)(1)).

Conclusion

Respondent failed to respond to the allegations of the complaint. By reason of the Findings of Fact set forth above, respondent has violated the Acts and the regulations issued under the Acts. Therefore, the Default Decision and Order is issued.

Order

Respondent Reefer Express Lines Pfy, Ltd. is hereby assessed a civil penalty of seven hundred fifty dollars ($750.00), which shall be payable to the "Treasurer of the United States" by certified check or money order and which shall be forwarded within thirty (30) days from the effective date of this Order to:

USDA, APHIS Field Servicing Office
Accounting Section, Butler Square West
5th Floor, 100 North 6th Street
Minneapolis, Minnesota 55403

Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 342.

This Order shall have the same force and effect as if entered after full hearing and shall be final and effective thirty-five (35) days after service of this Decision and Order upon respondent, unless respondent appeals to the Judicial Officer pursuant to section 1.145 of the rules of practice applicable to this proceeding (7 C.F.R. § 1.145).

Appendix B

In re Kaplinsky, 47 Agric. Dec. ____ (Mar. 30, 1988).

In re: MAURICE DUANI.
PQ Docket No. 288.
Decision and Order filed May 27, 1988.

Importation of dates from Israel without permit--Admission of material allegations.

The Judicial Officer affirmed Judge Baker's order assessing a civil penalty of $375 against respondent under the Plant Quarantine Act on the basis of *In re Kaplinsky*.

Cynthia Koch, for complainant
Respondent, pro se
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.

Decision and Order issued by Donald A Campbell, Judicial Officer.

DECISION AND ORDER

This is an appeal by respondent from an initial Decision and Order by an Administrative Law Judge (attached as Appendix A) under the Plant Quarantine Act of August 20, 1912, as amended (7 U.S.C. § § 151-164a, 167), and the regulations thereunder. Respondent's request for "an oral hearing" presumably refers to a hearing on the facts of the case. However, the case is governed by *In re Kaplinsky*, 47 Agric. Dec. ____ (Mar. 30, 1988), attached as Appendix B. Accordingly, the following order (which is the order that must be complied with, rather than the ALJ's order) should be issued in this case. If respondent is requesting oral argument before the Judicial Officer, oral argument, which is discretionary (7 C.F.R. § 1.145(d)), is denied, since the case is controlled by *Kaplinsky*.

Order

Respondent is hereby assessed a civil penalty of $375, which shall be payable to the "Treasurer of the United States" by certified check or money order, which shall be forwarded to:

United States Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within 30 days after service of this order. Respondent shall indicate on the certified check or money order that payment is in reference to P.Q. Docket No. 288.

Appendix A

UNITED STATES DEPARTMENT OF AGRICULTUR

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	P.Q. Docket No. 288
	)	
Maurice Duani,	)	
	)	
Respondent	)	Decision and Order

This is an administrative proceeding for the assessment of a civil penalty under the Plant Quarantine Act of August 20, 1912, as amended (Act), for a violation of the regulations issued under the Act that govern the importation into the United States of fruits and vegetables (7 C.F.R. § 319.56 *et seq.*).

This proceeding was instituted by a complaint filed on November 18, 1986, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture. The complaint alleged that on or about October 27, 1985, the respondent had imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Israel, approximately two pounds of fresh dates in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the dates were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

In response to the complaint, respondent filed an answer dated November 30, 1986. In his answer, respondent admitted certain material allegations in the complaint. Specifically, respondent indicated his address and admitted that on October 27, 1985, he brought dates into the United States that had come from Israel. Respondent explained that the dates were a gift, and that he did not realize he was in violation of any law when he brought the dates into the United States. Respondent's explanations are not mitigating circumstances that should be considered in regard to whether the requested civil penalty should be assessed. *In re: Richard Duran Lopez*, ___ Agric. Dec. ___, ___ (1985).

In his answer, respondent failed to deny or otherwise respond to the other material allegations in the complaint. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), such failure to deny or otherwise respond to an allegation in the complaint is deemed, for purposes of this proceeding, an admission of said allegation.

In view of the aforementioned facts, respondent has either admitted or is deemed to have admitted[1] the material allegations in the complaint, and, therefore, respondent has waived his right to a hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). This Decision and Order, therefore, is issued pursuant to sections 1.136 and 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § § 1.136 and 1.139).

Accordingly, the material facts alleged in the complaint, which respondent has admitted or is deemed to have admitted, are adopted and set forth herein as the findings of fact.

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[1]In an untimely request for an extension, filed November 24, 1987, (which is denied), Respondent further admitted the importation of the dates.

Findings of Fact

1. Respondent, Maurice Duani, is an individual whose address is 1321 Greeby Street[2], Philadelphia, Pennsylvania 19111.

2. On or about October 27, 1985, respondent imported into the United States at John F. Kennedy International Airport, Jamaica, New York, from Israel, approximately two pounds of fresh dates in violation of section 319.56(c) of the regulations (7 C.F.R. § 319.56(c)), because the dates were not imported under permit, as required by section 319.56-2(e) of the regulations (7 C.F.R. § 319.56-2(e)).

Conclusion

By reason of the facts in the findings of fact set forth above, respondent has violated the Act and regulations promulgated thereunder. Therefore, the following order is issued.

Order

Respondent, Maurice Duani, is hereby assessed a civil penalty of three hundred and seventy-five dollars ($375.00) which shall be payable to the "Treasurer of the United States" by a certified check or money order, and shall be forwarded to:

U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Field Servicing Office, Accounting Section
Butler Square West, 5th Floor
100 North Sixth Street
Minneapolis, Minnesota 55403

within thirty (30) days from the effective date of this order.

This order shall have the same force and effect as if entered after a full hearing and shall be final and effective 35 days after service of this Decision and Order upon respondent, unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.145).

Appendix B

In re Kaplinsky, 47 Agric. Dec. ___ (Mar. 30, 1988).

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[2]The spelling of respondent's street address has been changed from "Gruby" to "Greeby" to reflect the spelling that appears in respondent's answer.

CONSENT DECISIONS ISSUED

MAY 1988

(Not published herein.--Editor)

Animal Quarantine

HARRIMAN, LYNN. A.Q. Docket No. 285. 5/24/88.
KING LIVESTOCK COMPANY, HOPPY LOVELL, AND MARK HOLDER. A Q. Docket No. 311. Consent Decision as to Mark Holder. 5/10/88.

Animal Welfare Act

BARGER, JERRY. AWA Docket No. 438. 5/4/88.
DiSESSO, MOE, d/b/a TRAINED WILDLIFE AND FILMS. AWA Docket No. 88-1. 5/16/88.
FLEISCHER, WILLIAM R. (JR.), d/b/a B-MAR KENNELS. AWA Docket No. 88-3. 5/2/88.

Egg Research and Consumer Information Act

DINERMAN, HARVEY and CONNIE DINERMAN, d/b/a HARVEY'S EGG FARM. ERCIA Docket No. 12. 5/10/88.

Federal Meat Inspection Act/Poultry Products Inspection Act

OL' VIRGINIA PACKING, INC. FMIA Docket No. 88-1, PPIA Docket No. 88-1. 5/3/88.

Horse Protection Act

BOBO, CHARLES ALEX, MARGARETTE REEVES. HPA Docket No. 88-1. Consent Decision as to Margarette Reeves. 5/18/88.
RAGAN, JOE and DAVID RAGAN, d/b/a RRR FARMS, and SONNY SCRIVNER. HPA Docket No. 194. Consent Decision as to Sonny Scrivner. 5/4/88.
RAGAN, JOE and DAVID RAGAN, d/b/a RRR FARMS, and SONNY SCRIVNER. HPA Docket No. 194. Consent Decision as to Joe Ragan and David Ragan. 5/18/88.
SCRIVNER, LINDA. HPA Docket No. 196. 5/4/88.

Packers and Stockyards Act

B. J. HOLMES SALES COMPANY, INC., B. J. HOLMES SALES INTERNATIONAL, INC., DAVID L. MEARS, AND JEANNE M. MEARS. P&S Docket No. 6480. Consent Decision With Respect to David L. Mears and Jeanne M. Mears. 5/31/88.
B. J. HOLMES SALES COMPANY, INC., B. J. HOLMES SALES INTERNATIONAL, INC., DAVID L. MEARS, AND JEANNE M. MEARS. P&S Docket No. 6480. Consent Decision With Respect to B.J. Holmes Sales Company, Inc., and B.J. Holmes Sales International, Inc. 5/20/88.
BARNARD, ART (JR.). P&S Docket No. D-88-56. 5/16/88.

ERICSON LIVESTOCK MARKET, INC., JAMES D. BRINKMAN, HOWARD W. PITZER, JANE A. BRINKMAN, RONALD E. WILSON d/b/a RONALD WILSON CATTLE COMPANY, D/B LAND AND CATTLE COMPANY, INC., WILLIAM "DEAN" BRINKMAN, KATHERINE BRINKMAN, MARLEN LUBER, and JAMES "JIM" S. PATTERSON. P&S Docket No. D-88-28. Consent Decision With Respect to James Patterson. 5/24/88.

KLOEPPEL, THOMAS G. and McCOY MEAT PROCESSING, INC. P&S Docket No. 6421. 5/23/88.

LOMEO, SIMON. P&S Docket No. D-88-49. 5/2/88.

LOPPNOW, NORMAN. P&S Docket No. D-88-55. 5/12/88.

MOUNTAIN STATES CATTLE COMPANY, MIKE DONALDSON, PAM DONALDSON, and L.G. SPENCER. P&S Docket No. 6893. 5/31/88.

PHILIP LIVESTOCK AUCTION MARKET, INC., JEROME ROSETH, LUETTA ROSETH, GARY PETERSON and LONNIE ARNESON. P&S Docket No. D-88-47. Consent Decision With Respect to Philip Livestock Market, Inc., Jerome Roseth and Luetta Roseth. 5/16/88.

SWIFT INDEPENDENT PACKING COMPANY and ROBERT BEARDEN. P&S Docket No. 6918. Consent Decision With Respect to Robert Bearden. 5/18/88.